IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL.,	)	
	)	
Plaintiffs,	)	Judge David D. Dowd, Jr.
	)	Akron, Ohio
vs.	)	
	)	Civil Action
AMERICAN BRANDS, INC., ET AL.,	)	Number 5:94CV1302
	)	
Defendants.	)	

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY,

ON FRIDAY, SEPTEMBER 28, 2001.

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VOLUME 5

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APPEARANCES:

For the Plaintiffs: A. Russell Smith, Esq.
R. Bryan Nace, Esq.
A. Russell Smith Law Offices
503 Key Building
159 S. Main Street
Akron, Ohio 44308

For Deft. American: James E. Milliman, Esq.
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
and
Michael J. Suffern, Esq.
Dinsmore & Shohl
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202

For Deft. Philip Morris: Walter L. Cofer, Esq.
Shook, Hardy & Bacon
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
and
Diane P. Chapman, Esq.
Baker & Hostetler
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485

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For Deft. Liggett: Kenneth J. Walsh, Esq.
Tyler L. Mathews, Esq.
McDonald, Hopkins, Burke & Haber
2100 Bank One Center
600 Superior Avenue, E.
Cleveland, Ohio 44114-2653

For Deft. Lorillard: Patrick M. McLaughlin, Esq.
Craig Proctor, Esq.
McLaughlin & McCaffrey
Eaton Center, Suite 1350
1111 Superior Avenue
Cleveland, Ohio 44114-2500

Official Court Reporters: Susan K. Trischan, RMR, CRR
Richard G. DelMonico, RPR
U.S. District Court - Room 568
Two South Main Street
Akron, Ohio 44308-1811
330/374-9335

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

THE COURT: Please have a seat.

We are one juror short. One juror called in with car trouble and is not here yet.

MR. SUFFERN: Your Honor, may I ask a question about the groundrules of interim argument?

THE COURT: Do you want to go on the record?

MR. SUFFERN: No, I don't think we need to be.

(Discussion had off the record).

THE COURT: I came out early to see if there's anything I need to address.

I don't see plaintiff's counsel, so --

MR. COFER: We sent someone out to get him. He's here. I think he's meeting with his witness.

THE COURT: We have had really poor days so far in chalking up minutes. I'm hoping today we break the model we have developed so far, which is poor days as far as minutes are concerned.

I consider a good day 325 minutes. Yesterday we did 255. Of course, I left early. That was part of the problem.

MR. McLAUGHLIN: Well, Your Honor, Sue won't let me talk any faster so.

(Pause).

THE COURT: Where is Russ?

MR. NACE: Your Honor, if we could go with the tape, start with the tape.

THE COURT: Yes, sure. Are you all set up to run it?

MR. NACE: Yes.

THE COURT: Get the screen ready.

Now, this is going to last about an hour and a half? I would think so.

MR. McLAUGHLIN: No.

MR. PROCTOR: Maximum --

THE COURT: It went to Page 91, and it goes to 170, doesn't it?

MR. PROCTOR: I think the pace of the questioning is a little more rapid on cross-examination.

THE COURT: I'll try to run it through before

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we take the morning recess, although I saw yesterday the direct took 88 minutes according to my time sheets. So I'm thinking I might break, depending on how we are going.

MR. NACE: Your Honor, the tape technician who edited it, he said to me this morning the one tape was an hour, and we haven't finished with the first tape yet so there is more than an hour is all I know.

THE COURT: I'm going to have to break at 10:30. I have an arraignment in a criminal case.

MR. McLAUGHLIN: Your Honor, it's not a

problem. Whenever you want to break, it's not a problem.

THE COURT: I'm going to wait until 10:30 anyway, so go get the jurors.

A point of curiosity, when did Mr. Tompkin die?

MR. NACE: 1996.

MR. McLAUGHLIN: February of 1996.

THE PLAINTIFF: Yes.

THE COURT: Okay. So he lived more than a year after this?

MR. McLAUGHLIN: Yes.

THE COURT: I don't think that fact has been established clearly.

You might want to stipulate that somewhere, because my guess is the jury may be wondering.

MR. McLAUGHLIN: Yes, that's a good point.

THE COURT: Maybe at the end or maybe even before you start it.

MR. McLAUGHLIN: Maybe we can establish it with Dr. Haas when he testifies.

MR. NACE: Or Dr. Tomashefski.

MS. CHAPMAN: Your Honor, you are going to see some real progress today, those witnesses.

Right, Bryan?

MR. NACE: That's right. That's right.

THE COURT: I live in hope.

(Laughter).

(Jury in).

THE COURT: Good morning. Please be seated.

We are going now to see the cross-examination of David Tompkin that occurred on the same day as his direct examination, which you viewed yesterday.

So we are ready now to proceed with the -- I think there is a cross and I think there's a little bit of redirect, too, as I recall.

MR. NACE: Yes, Your Honor.

THE COURT: All right. We want to darken the lights here.

(The following proceedings were taken from a videotape deposition:)

CROSS-EXAMINATION OF DAVID TOMPKIN

BY MR. RILEY:

Q. I'm an attorney for the American Tobacco Company. I've got some questions here to ask you this afternoon.

First of all, as I understand it, sir, you quit smoking cigarettes in 1965, is that right?

A. Yes, sir.

Q. And after 1965, you never smoked cigarettes again?

A. No, sir.

Q. Okay. And you never used any form of tobacco

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products since 1965, is that right?
A. That's right.
Q. And you were about 30 or 31 years old when you quit smoking?
A. Right, that would be 31.
Q. And as I understand it, the reason that you quit smoking was that you felt that smoking was -- was affecting your breath, is that right?
A. My breathing capacity, yes, sir.
Q. And you felt that at work, it affected your ability to -- at work, is that right?
A. Yes, sir.
Q. And no one told you that the reason you were losing your breath was because of smoking, did they?
A. No, sir.
Q. Okay. You didn't need to be told that, did you?
A. No, sir.
Q. Okay. That was something you knew yourself?
A. I -- yes, sir.
Q. Okay. In other words, it was just common sense to you that the reason you were losing your breath was that you were smoking, is that right?
A. Yes, sir.
Q. Okay. And you made up your mind to quit smoking in 1965?

A. Yes, sir.
Q. And you quit cold turkey?
A. Yes, sir.
Q. You simply decided not to smoke any more, is that right?
A. Yes, sir.
Q. And you agree, wouldn't you, that if people put their mind to it, they can quit smoking if they want to?
A. No, sir.
Q. You don't believe that?
A. Certain people.
Q. You were one of those people?
A. I feel that I -- I like to control my life to a certain extent, yes.
Q. You were a person who could quit smoking if you put your mind to it, isn't that right?
A. I feel, yes.
Q. Okay. Now, I understand that you were diagnosed with lung cancer in 1992, is that correct?
A. Yes, sir.
Q. Okay. And at that time you had been an ex-smoker for almost 30 years?
A. Well, less than -- I think it would be less.
Q. 27, 28 years?
A. Somewhere in that, yes, sir.

Q. And you were experiencing pain in your ribs, I think you told us?
A. It was right across the -- right across there on the right side.
Q. And you went to see Dr. Wilson because of that pain, right?
A. Yes, sir.
Q. And you told Dr. Wilson when you went to see him that

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you weren't having any cough or fever or chills, is that right?
A. That's right.
Q. And you also told the doctors who treated you for lung cancer that you were not experiencing shortness of breath, isn't that correct?
A. Now, do -- can I hear that phrase again, sir --
Q. Well, did -- did --
A. -- please?
Q. -- you ever -- did you ever tell any of your doctors that you were not experiencing shortness of breath at the time you were diagnosed with lung cancer?
A. Fatigue.
Q. Okay. I'm asking you about shortness of breath.
A. But lung -- when you use the term lung cancer, Dr. Haas was the first one that told me I had lung cancer. Dr. Wilson didn't.

Q. Maybe I'm not being very clear --
A. That's right.
Q. -- about my question.
My question to you is: When you were diagnosed with your lung cancer, did you tell your doctors that you were not having shortness of breath?
A. Dr. Haas?
Q. Any of your doctors.
A. I could have. I don't -- I don't recall.
Q. If that's in your medical records, you wouldn't have any reason to dispute that?
A. If -- if it's in there.
Q. Now, I understand that you went -- underwent a bronchoscopy and a mediastinoscopy, and that was in June of 1992, is that right?
A. Yes.
Q. Okay. And according to the records -- and I'll be happy to show them to you if you'd like -- but the records show that that procedure was done on June 15th, 1992.
Do you have any reason to doubt that date?
A. No, sir.
Q. And where was that, that procedure done?
A. Falls General.
Q. Okay. And you understood at that time that the doctors were looking to see if you had cancer, is that

right?
A. They were -- they were checking -- going to take a biopsy, I presume.
Q. And the purpose of the biopsy was to see if you had cancer, correct?
A. It's possible, yes.
Q. That's what they were looking for, to see if you had cancer?
A. I -- I imagine, yes, sir.
Q. And you knew that at the time they were doing that procedure, right?
A. Nobody said -- I don't recall ever hearing the word "cancer," no, sir.
Q. But you understood that that's what they were looking for?
A. I would imagine.
Q. Okay. And after the doctors did the bronchoscopy and

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the mediastinoscopy, did any of them come to see you that day?
A. Not that I recall.
Q. Okay. Did you go see Dr. Wilson a few days after that procedure was done?
A. It's -- I'm not clear on those -- the doctors and times I saw and so forth.
Q. Well, let me show you -- and we've marked it before.

It's defendants -- I'm sorry, I'll give you this copy -- it's Defendant's Exhibit 20.
And this is a -- a note from Dr. Wilson's office.
And you see up there where it says David Tompkins, and they misspelled your name, but it's 6/18/92?
Do you see that?
A. Yes, sir.
Q. Okay. And it says "David comes into the office today to follow-up in regards to his pain in his right chest radiating into the back area."
Do you see that?
A. Yes, sir.
Q. Now, do you have any reason to dispute that you went to see Dr. Wilson on June 18th, 1992?
A. No, sir.
Q. Okay. And reading a little bit below that, it says "Patient was referred to Dr. Harris who performed mediastinoscopy and fiberoptic bronchoscopy on June 15th, 1992 which revealed a large cell metastatic adenocarcinoma which is classified as undifferentiated."
Do you see that?
A. Yes, sir.
Q. Okay. Now, did Dr. Wilson or anybody else tell you the results of that mediastinoscopy and bronchoscopy?

A. In the office that day -- this is the day my wife was present?
Q. Yes, sir. It does -- it does say that your wife was there.
A. Okay. The only thing I remember on that day that comes back, I've been trying to bring it back, is to go see an oncologist and he recommended Dr. Kroft.
Q. Okay. If you see down -- a little bit farther down the page, it says "The ramifications of the disease process and outcome on treatment origins were discussed with the patient today and his wife present."
Right?
A. Okay.
Q. And did Dr. Wilson discuss with you your disease process and the outcome on treatment?
A. I don't recall, sir. I don't remember.
Q. He told you to go see an oncologist, right?
A. That I remember, yes.
Q. And an oncologist is a cancer specialist?
A. Yes.
Q. Okay. And so you knew on June 18th, 1992 that you had cancer, correct?
A. I would have to say yes.
Q. Okay. Now, would it be fair to say, Mr. Tompkin, that cancer runs in your family?

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A. No, I wouldn't say it runs.
Q. Okay. Well, your mother had cancer, is that right?
A. Yes, sir.
Q. Okay. She had stomach cancer?
A. Yes, sir.
Q. She never smoked cigarettes?
A. No, sir.
Q. Okay. Your father has cancer of the sweat glands, correct?
A. Yes, sir.
Q. He never smoked cigarettes either, did he?
A. No, sir.
Q. Okay. And I think you told us that cancer of the sweat glands is a rare kind of cancer, correct?
A. That's what I -- what I've heard.
Q. That's what you've been told?
A. Right.
Q. Okay. And your maternal grandfather, your mother's father, had stomach cancer also, is that right?
A. That's what I was told, yes, sir.
Q. Okay. And he was a nonsmoker also, is that right?
A. I think --I -- that I'm not sure.
Q. Well, let me see if I can refresh your memory here.
I'm going to hand you your deposition transcript. I'm going to ask you to look at Page 21,

please.
21, I'm sorry, not 51. 21.
And take a look at Line 5 and Line 6. Were you asked these questions: "Were either of them cigarette smokers," and this is referring to your grandfather and your mother, right?
A. Yes, sir.
Q. And your answer was "No," correct?
A. That's right.
Q. Okay. So you told us last week that your grandfather was not a cigarette smoker, correct?
A. I never saw my grandfather smoke a cigarette, no, sir.
Q. To your understanding, though, he was never a smoker?
A. He -- he died in 1939.
Q. Okay. Now, you have been a brick mason for 40 years, is that right?
A. Yes, sir.
Q. Okay. And you've worked in and around construction during that time?
A. Yes, sir.
Q. And throughout that time, you have worked in dirty and dusty conditions, isn't that right?
A. Yes, sir.
Q. You've worked around cement dust, right?

A. Yes, sir.
Q. Around mortar, right?
A. Yes, sir.
Q. Lime?
A. Very little, but yes.
Q. That's used in the mixing process?
A. Yes.
Q. Okay. And at the end of the day, when you would go

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home, your clothes would be dirty and dusty, is that right?
A. Yes, sir.
Q. Okay. And during your career you've worked around asbestos, isn't that right?
A. Yes, sir.
Q. Okay. And isn't it true that you told your doctors that you had been heavily exposed to asbestos?
A. Yes, sir.
Q. Take a look, and I'm going to show you this, this is Exhibit 9. We saw this last week.
But this is a note from the Akron General Medical Center, and it says here, if you read up on "social," do you see where it says "social" up towards the top?
A. Okay.
Q. Okay. It says "Construction worker all his life, with extensive exposure to asbestos."

Is that what it says?
A. Yes, sir.
Q. And is that what you told the doctors?
A. Evidently, yes, sir.
Q. Is it true, sir, that when you were diagnosed with lung cancer, the first thing that you thought was the cause of your lung cancer was asbestos?
A. Yes, sir.
Q. Now, before you were a brick mason, you worked in a rubber plant, is that right?
A. Yes, sir.
Q. Okay. And that was for just a little less than a year?
A. Right.
Q. Okay. And you worked in the curing room?
A. Yes, sir.
Q. Okay. And that's where you spent most of your day, is that right?
A. Yes.
Q. Okay. Can you -- what did you do in the curing room? What went on there?
A. They brought in -- you had rubber that was cut up, you had mold that was in three sections. You'd lower the -- the bottom part and you'd put the raw rubber in the top. Well, I -- it came from a colander, however it was

mixed, I don't -- but it was hard.
You put it in there, you lower the top plate, you pushed it into a mold that was probably the squareness of this here (indicating). Then you had two valves that you put -- high pressure and low pressure. You put it down, pressed the rubber and then you'd bump it to get the air out of it.
And then it would extrude it through into a finished product in a blow mold.
Q. Was there a smell in the curing room?
A. Yes.
Q. Okay. Can you tell us what that smelled like? Was it a strong smell?
A. Some was and some -- it all depends on the types of rubber.
Q. Okay. It usually smelled pretty bad in there, though, didn't it?

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A. I'd say, yes.
Q. Okay. And you didn't have any breathing apparatus when you were working there, did you?
A. No, sir.
Q. Let's put aside smoking for a second, but have you -- is there anything in your life, sir, that you've done that you knew was bad for your health or that you thought was bad for your health?

A. Well, drinking.
Q. Okay. You quit drinking in 1989, right?
A. Yes, sir.
Q. You used to drink beer, right?
A. Yes, sir.
Q. Sometimes you'd drink gin?
A. Yes, sir.
Q. And I think you agreed that you -- you abused alcohol?
A. From 1984 through 1989, I would say yes.
Q. And you agree that you drank excessively, right?
A. Well, when you -- what's -- do you mean excessively?
I wrote ten to twelve beers. That would be the maximum amount.
Q. Well, do you agree that you used to drink excessively?
A. I abused alcohol, yes, sir.
Q. Excessively? You abused -- I'm sorry, I didn't hear what you said.
You said abused alcohol?
A. I abused alcohol.
Q. I thought you said -- all right.
And you used to drink ten, twelve beers a day you said?
A. Not everyday, but I would use that as a top figure,

yes.
Q. And you used to drink on the job?
A. A few times, yes.
Q. Okay. Is it correct that you used to then drink ten to twelve beers a day for 20 years?
A. No, sir.
Q. That's not true?
A. No, sir.
Q. Well, let me show you the records.
A. Yes.
Q. It says here, under social habits -- and the date of this record is 1992, is that right? Do you see that at the top?
A. I see social habits down here, whatever.
Q. Okay. This record is signed by Dr. Wilson.
Do you see his signature at the bottom?
A. Yes, sir.
MR. KOETHE: What's the exhibit number on that?
MR. RILEY: I'm sorry, it's Exhibit Number 10.
Q. And Exhibit 10 says "Positive ETOH."
Do you see that under social habits?
A. Yes, sir.
Q. And you know that means alcohol?

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A. Yes -- no, I don't.
Q. You don't but, okay, you'll take my word for that one?
A. Yes, sir.
Q. Okay. Then it says ten to twelve beers a day times 20 years. Is that what it says?
A. Yes, sir.
Q. Okay. And is that what you told Dr. Wilson?
A. Can I clarify this?
Q. Well, is that what you told Dr. Wilson?
MR. SMITH: I'm --
A. I don't remember.
Q. Did you tell Dr. Wilson that?
A. Evidently I did, yes, sir.
Q. Okay. Would you like to explain that?
A. I was asked when I started drinking, and I says approximately 1970 which would cover a 20-year span.
The phrase, if I recall at the time, was how many beers are you drinking today or when you quit, and I says approximately ten to twelve.
Q. Okay. Now, if you'd take a look up, further up on Exhibit Number 10, it says "asbestos exposure, construction worker," do you see that?
A. Yes, sir.
Q. Okay. And it also says P-H.

Do you understand that understands past -- means past history?
A. Okay.
Q. "Past history of minimal tobacco exposure," that's what it says, isn't that right?
A. I can't read it now, but --
Q. You can't read that? Okay.
A. No.
Q. Is that what it looks like it says?
A. That's -- it could be anything. No, sir, I don't know.
Q. Okay. Now, I understand that you've had a -- have had a nervous stomach since about the early 1960s?
A. Yes.
Q. I think that's how you described it, as a nervous stomach?
A. Yeah, that's -- he called it, yeah, I'd say that's the term, right.
Q. Okay. And were you ever diagnosed with an ulcer?
A. Not to my knowledge, no, sir.
Q. Did you ever tell any of your doctors that you had peptic ulcer disease?
A. Not that I recall.
Q. Well, should I refresh your recollection?
A. Yes.

Q. And this is Defendant's Exhibit 14 I'm going to show you.
And this -- this record is -- is from Cuyahoga Falls, right?
A. Yes, sir.
Q. Okay. And see where it says "Brief history"?
A. Um-hmm.
Q. It says -- would you read the third line there? It

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says "History of peptic ulcer disease in the past," is that right?
A. Peptic ulcer disease?
Q. Do you see that? Right there.
A. Okay. Yes, sir.
Q. Okay. That's what it says?
A. Yes.
Q. Okay. And so did you tell your doctors that you had a history of peptic ulcer disease?
A. Not that I recall, no, sir.
Q. You don't have any explanation for that, why that would be in there if you didn't tell them that, do you?
A. No, sir.
Q. Okay. Did you ever take medication for your stomach?
A. Yes.
Q. Okay. Is that called Hyoscyamine?
A. I asked -- I asked my wife, and it was -- Donnatal I

think was the original pill, and then high -- whatever it is, is the generic term for it.
Q. Okay. And you took that from about 1964 to the 1980s, right?
A. That could be off and on, but approximately.
Q. Okay. And how often would you take that?
A. When I first started taking it, it was before I -- one before every meal, and I -- it may have been one, one in the evening before I went to bed. I'm not sure.
Q. Okay. So twice a day?
A. Well, three, four times.
Q. Three, oh, four times, okay.
A. Maybe it would be four times. I'm not sure.
Q. Okay. And then how often would you do that?
A. Probably the first year. It's probably for a year, year, somewhere in there.
Q. And then how about after that?
A. It's sporadically.
Q. Did you ever stop drinking because it bothered your stomach?
A. That's the odd part. Drinking helped my stomach.
Q. Helped your stomach? So if you were having problems with your ulcer, you would continue to drink?
A. I didn't have -- I never heard the word "Ulcer." Nobody ever, ever told me --

Q. Okay. If your stomach was bothering you, you would continue to drink?
A. Well, I drank, yes.
Q. Did any doctor ever tell you not to drink because of your stomach?
A. No, sir.
Q. Did you drink while you were taking either the Donnatal or the Hyoscyamine?
A. It's possible, yes.
Q. Did you know you weren't supposed to drink alcohol while you were taking those medications?
A. No, sir.
Q. You never saw a warning or any instructions not to drink while you were using those medications?
A. Not that I recall.
Q. Did a doctor ever tell you that you should stick to a bland diet?

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A. No, sir.
Q. Would you mark that, please?
Let me show you what we've just marked as Defendant's Exhibit 23.
Do you see at the very bottom there --
A. Um-hmm.
Q. -- the entry that's dated 1/13/67? Do you see that?
A. Yes.

Q. It says "check stomach, heartburn," right, "gastritis," do you see that?
A. Yes.
Q. Okay. And then if you look at the very last line there, it says "bland diet," correct?
A. Yes, sir.
Q. Okay. So apparently you were told to stick to a bland diet in 1967, is that right?
A. Evidently somebody said something to me, yes.
Q. Okay. Did you consider drinking beer or using alcohol excessively part of a bland diet?
A. Well, that was in '67. I didn't start drinking until later.
Q. Okay. Did -- didn't you continue taking your medication until the 1980s?
A. Very sporadically.
Q. But your stomach, you had a problem with your stomach, you had a problem with your stomach through the 1980s, is that right?
A. It comes and goes, yes, sir.
Q. When you were drinking ten to twelve beers a day, did you do that because of advertising?
A. No, the beer I drank was through advertising.
Q. But you didn't drink because of the ads you saw, right?

A. No, sir.
Q. It's something you did because you wanted to, right?
A. Yes, sir.
Q. Okay. You didn't consider yourself an alcoholic?
A. No, sir.
Q. Okay. And you were able to stop drinking without much trouble, isn't that true?
A. No, it was kind of hard.
Q. Okay. Didn't you tell us last week that you were able to quit without much trouble?
A. Well, I would say, if that's what I said.
Q. Well, let's turn to Page 140 of your deposition last week.
Take a look at Page -- at Line 9 on Page 140.
A. Okay.
Q. And you were asked this question: "Did you find that by putting your mind to it, you were able to give up drinking without too much difficulty?"
And your answer was: "Yes, sir."
A. Right.
Q. Is that right?
A. Yes.
Q. Those were the questions you were asked and the answer you gave?
A. Yes.

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Q. And you didn't need any assistance to quit drinking?
A. No, sir.
Q. And when you were drinking, you knew that drinking ten to twelve beers was an unhealthy thing to do, isn't that right?
A. Yes.
Q. That didn't stop you from drinking, though, did it, at the time you were doing it?
A. Unhealthy?
Q. Yes, sir. It was unhealthy to drink that much alcohol a day?
A. I didn't really -- could I back up here?
I didn't really think -- when you use the word "unhealthy," I knew it was -- it was doing something to my system, yes.
Q. Go ahead, Mr. Tompkin, finish your answer.
A. I knew it was affecting me, and it was something that was starting to get a control of me, ahold of me, and I just knew I had to do it and I quit.
Q. When you say you knew it was affecting you, that means you knew it was bad for your health, right?
A. If you want to put it in that terms, yes.
Q. Okay. Now, I understand, Mr. Tompkin, that you can't say when you started smoking on a regular basis, is that right?

A. What -- if I have to pinpoint it, what --
Q. You couldn't tell us -- if I asked you what year it was, you couldn't tell me?
A. What's -- what's regular?
Q. Well, on a daily basis.
A. Daily basis?
Q. You couldn't tell me that.
A. Probably around -- yes, 1950.
Q. When you first tried smoking cigarettes, isn't it true that smoking made you dizzy?
A. I don't recall.
Q. Okay. Why don't I refresh your memory then? Take a look at Page 44 --
A. Okay.
Q. -- of your deposition last week.
Okay. And take a look at Line 2.
A. Yes.
Q. It says: "Did it make you feel dizzy or nauseous, for example?"
And you said:
"Answer: I think it was dizzy. Nauseous wouldn't be it."
That was the answer you gave, right?
A. Um-hmm.
Q. Yes?

And then the next question was: "You think the cigarettes made you feel dizzy?" And your answer was: "I would say that would be correct."
Right?
A. Yes.
Q. That's what you said?
A. That's what I said there, yes.
Q. Now, because smoking made you feel dizzy, did -- did

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you think it might not be a good thing for you to do?
A. I don't know.
Q. That never went through your mind, that it would be a bad thing to do because it made you dizzy?
A. I don't know.
Q. When you first started smoking, you got your cigarettes from friends, isn't that right?
A. Partially, yes, sir.
Q. And you didn't buy cigarettes --
A. That I --
Q. -- when you first started.
A. When I first started?
Q. The reason that you smoked cigarettes when you -- when you first started experimenting with cigarettes, was because the older kids smoked, right?
A. Partially, yes.
Q. That's -- that's -- that's the reason, isn't it? You

wanted to be like the older kids, isn't that right?
A. Well, everybody does.
Q. And you didn't smoke in front of your parents when you first started?
A. No, sir.
Q. Your parents told you you shouldn't smoke, didn't they?
A. I don't recall, yes.
Q. I'm sorry?
A. I'm -- I don't recall.
Q. Okay. You don't recall whether they told you you shouldn't smoke or not?
A. I don't believe -- I never heard them say anything to that effect, but -- but it could be very possible that they did say that.
Q. Your parents told you that they didn't --
MR. SMITH: What page are we on, please?
MR. RILEY: I'm just going to ask a question, if that's all right.
BY MR. RILEY:
Q. Didn't your parents tell you that they didn't like you smoking?
A. I'd say yes.
Q. Okay. Did they give you a reason?
A. Not that I recall.

Q. You didn't ask for a reason, did you?
A. Not that I recall.
Q. You didn't need to ask them for a reason, did you?
A. I just -- just didn't ask.
Q. You didn't ask?
A. No.
Q. The reason you didn't ask is because you knew the reason was that smoking was bad for you, isn't that right?
That's what your parents thought and you knew that?
A. It's -- it's just too hard to go back and say yes or no to that question. Who knows?
Q. You just don't know one way or the other?
A. No, sir. I can't remember.
Q. Now, I think you told us that your brother Gilbert used to smoke Old Gold cigarettes?
A. Yes, sir.

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Q. And that's the reason you smoked Old Gold cigarettes, isn't that right?
A. Yes.
Q. Okay. And there's no other reason that you smoked Old Gold cigarettes, isn't that true?
A. Not that I recall, no.
Q. Okay. And you didn't know why you smoked Philip Morris cigarettes, isn't that true?

A. Not really.
Q. Okay. You don't remember why you switched to Pall Mall cigarettes, do you?
A. No, sir.
Q. You don't know why you switched to Chesterfield, isn't that true?
A. Right.
Q. Now, did you switch to Herbert Tareyton because it had a filter?
A. The charcoal.
Q. But did you switch to Herbert Tareyton because it had a charcoal filter?
A. Now that I look back, I would say yes.
Q. Take a look at Page 51 of your deposition, Mr. Tompkin.
A. Right.
Q. Page 51, Line 17. Can you see that?
A. Um-hmm.
Q. Okay. And this is a deposition you gave to us last week, is that right?
A. Sometime here, yes, sir.
Q. Okay. And that, in fact, that deposition took place in this room, right?
A. Yes.
Q. Okay. And you were sworn to tell the truth?

A. Yes.
Q. Okay. And your -- the question you were asked at that time was: "Is it your testimony that you switched to Herbert Tareytons because that cigarette had a filter?"
That's the question you were asked, right?
A. Okay.
Q. And your answer was: "I don't know."
A. Okay.
Q. Isn't that right?
A. I see it here, yes, sir.
Q. That's what you told us last week?
A. Yes.
Q. Okay. Do you remember what it was about the filter that lead you to switch to Herbert Tareyton?
A. It was the charcoal.
Q. Okay. Anything else other than that?
A. No, sir, nothing.
Q. Okay. Did you think that smoking a filtered cigarette was going to be better for your health?
A. Today, yes.
Q. Okay. Back then, did you think that smoking a cigarette with a filter was better for your health?
A. It's.
Q. I want to know what you thought at the time; not today?

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A. It's hard to go back that long and say what you actually thought.
Q. Okay.
A. But --
Q. Well, isn't it true that you can't say one way or the other whether you thought a filtered cigarette was safer or not, isn't that true?
A. I would say it had a -- it had a benefit or had a -- had me leaning in that direction it was better for my health.
Q. Did you think that at the time?
A. Did I think that at the time? I don't know.
Q. Okay. Take a look at Page 51 of your deposition.
A. Yes.
Q. And you were asked, on Line 23 --
A. Um-hmm.
Q. -- "Did you believe that the filter would somehow be more beneficial to your health, by smoking a cigarette with a filter?" And your answer on Page 52 was: "I don't know."
Right?
A. Right.
Q. So you don't know whether you thought it was safer or not, do you?
A. I've been thinking quite a bit about this, and I

would -- the way the pattern's laid out, yes, I would have to say yes.
Q. So that's the conclusions you've reached in the last ten days, right?
A. No, I've been thinking about this longer than that.
Q. Okay. Did you reach that conclusion before November 8th when we took your deposition, sir?
A. No, sir.
Q. Okay. Other than the fact that Herbert Tareyton had a filter, you have no other recollection of what lead you to smoke a Herbert Tareyton, isn't that right?
A. Yes.
Q. Now, when you say that you thought Herbert Tareyton or a filtered cigarette might be safer, a filtered cigarette, safer than what?
A. Safer than non.
Q. Okay. And what did you want to be -- I mean, what -- what was the danger of smoking cigarettes?
A. Well, it had to be unhealthy for you then.
Q. Okay. And you knew that at the time?
A. No, sir, I didn't know.
Q. You didn't know that?
A. Not that I could say.
Q. So then the reason you wanted a filtered cigarette had nothing to do with health, is that true?

A. I don't know.
Q. Okay. One way or the other?
A. I know it's one way or the other but --
Q. But you don't know one way or the other.
A. You are asking me back at that time frame. It's -- I know from the ads that I saw and so forth that evidently it lead me to believe that, yes.
Q. Well, sir, my question to you is this: Did you know

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at the time that smoking cigarettes was dangerous for your health?
A. I don't know.
Q. So then you can't say that the reason you smoked a filtered cigarette was to protect your health, isn't that true?
A. I do today.
Q. I know what you think today, but I'm asking about what you thought at the time.
A. I can't remember.
Q. Okay. Now, as I understand your testimony today, you began smoking Kent in 1961, correct?
A. Yes.
Q. Okay. And when you began smoking Kent, did you think that smoking Kent was safer for your health?
A. Here again, I'm not sure.
Q. Isn't it true, Mr. Tompkin, that you started inhaling

cigarettes, first started inhaling cigarettes in the time period about 1956 to 1959?
A. Inhaling?
Q. Yes, sir.
A. I don't remember that.
Q. You can't say you inhaled before 1956, then?
A. Oh, I probably did, yes, sir.
Q. Do you remember inhaling before 1956?
A. Probably did.
Q. All right. Take a look at Page 53 of your deposition.
A. Um-hmm.
Q. Page 53, Line 3.
A. Yes.
Q. The question you were asked: "Did you inhale when you smoked during the 1956 to '59 time period?" Your answer was "Yes, sir."
A. Um-hmm.
Q. The next question was: "Did you inhale when you smoked during the 1950 to '55 time period?" And your answer then was: "I don't know that."
Correct?
A. Yes.
Q. That's what you said?
And then you were asked on Line 12, "What's

your best recollection" and your answer was "I would say those there, I probably inhaled those there, yes."
And that was referring to 1956 to '59, correct?
A. Yes.
Q. Okay. So according to your deposition testimony last week, your best recollection is that you started inhaling between 1956 and 1959, right?
A. I don't know. I said back up here in '50 to '55 period, I don't know.
Q. Okay. So you don't know what you did before 1956?
A. No, sir.
Q. Now, did you enjoy smoking?
A. No. Only after a meal.
Q. Okay. And with a drink?
A. And a drink.
Q. Okay. So there are times a day that you did enjoy

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having a cigarette?
A. Yes.
Q. Do you think you would have quit if you didn't enjoy it?
A. I don't know.
Q. Mr. Tompkin, no one ever told you that smoking was not harmful to you, did they?
A. No. Not that I recall.

Q. Okay. Nobody ever told you that smoking was not associated with lung cancer, did they?
A. What was that again now you said?
Q. My question was: No one ever told you that smoking was not associated with lung cancer?
A. I don't know.
Q. No one ever told you that smoking was safe, did they?
A. Not that I know of. I don't know.
Q. You never read anything or you never saw anything on TV that said --
A. No.
Q. -- smoking was not harmful, did you?
A. Just some -- just some ads that said more doctors --
Q. Mr. Tompkin, did you ever read anything or see anything on TV that said smoking was not harmful?
A. Did I ever see anything on TV?
Q. Did you ever read anything?
A. Ever read anything?
Q. Or see anything on TV that said smoking was not harmful?
A. No, not that I recall.
Q. And you never read anything or heard anything that said if you smoked cigarettes, you would not get lung cancer, did you?
A. I would not?

Q. That you would not get lung cancer?
A. I didn't see those specific words, no, sir.
Q. Prior to testifying here today, you've gone back and looked at some old cigarette ads, isn't that true?
A. Yes.
Q. The ads that you looked at were given to you by your lawyers, correct?
A. Yes, sir.
Q. Okay. You didn't ask for that material, did you?
A. No, sir.
Q. You don't know how they selected the ads to show you, do you?
A. No, sir.
Q. You don't know how they were put together, do you?
A. No, sir.
Q. And you didn't have anything to do with collecting those ads yourself, did you?
A. No, sir.
Q. Okay. You just relied on your lawyers, isn't that true?
A. Yes.
Q. And you don't know where your lawyers got the materials, do you?
A. Not to my knowledge, no.
Q. Now, you told us about having read "Life" and "Time"

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magazine, right?
A. Yes.
Q. And I understand there were a lot of magazines around your house?
A. Yes.
Q. It's because you used to collect the magazines, right? You and your brothers.
A. Yes.
Q. Okay. And you collected all magazines, right?
A. Yes.
Q. And that would include "Life" and "Time," right?
A. I'm not sure about "Time," but I know "Life" was in there.
Q. Well, "Time" probably was because you collected them all, right?
A. Yes, whatever was available during that time period.
Q. And "Reader's Digest," too?
A. That -- that would be a good assumption.
Q. "Reader's Digest," if you recall, was a really popular magazine at that time, wasn't it?
A. Well, I was eight, ten years old, twelve. I would say probably, yes.
Q. You used to look at the pictures in those magazines, right?
A. Um-hmm.

Q. "Life" in particular?
A. Yes.
Q. Okay. Let me show you what we have marked as Defendant's Exhibit Number 24.
And that's -- that's a "Life" magazine article --
A. Um-hmm.
Q. -- from December 21st, 1953, is that right?
A. Yes, sir.
Q. Okay. And you told us before -- you told Mr. Smith that you liked to look at the pictures in "Life" magazine, isn't that right?
A. Yes, sir.
Q. Okay. Take -- turn to Page 20 on that, on that exhibit.
Did you look at those pictures, Page 20 and 21?
A. Yes, sir.
Q. Huh?
A. Yes, I see 20.
Yes, sir.
Q. Do you recall looking at those pictures in "Life" magazine back when you were -- you would have been about 18 at this point?
A. No, sir.

Q. You have no recollection of ever seeing those before?
A. No, sir.
Q. It's possible you did; you just don't recall.
Is that your testimony?
A. Yes, sir. Yes.
Q. Okay. In fact, you probably did see them, isn't that true?
A. I didn't say that, no, sir.

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Q. Isn't it true that if you look on Page 21, it says, the title there is "Smoke gets in the news," is that right?
A. Yes, sir.
Q. And it says "Doctors report tobacco tar induces mouse cancer, note rise in cigarette use and human lung cancer."
That's what it says?
A. Yes, sir.
Q. Okay. Now, does that refresh your memory about whether you saw that?
A. No, sir.
Q. Take a look at Exhibit Number 25, if you would. This is a "Life" magazine from July 5th, 1954, is that right?
A. Yes, sir.
Q. And then there's some drawings on Page 26 and 27 and 28, right?
A. Yes, sir.
Q. Okay. And you told us you liked to look at the

pictures in "Life" magazine, isn't that true?
A. Yes, sir.
Q. The article here is titled "The week's topic A, how do I swear off," question mark, right?
A. Yes, sir.
Q. And underneath it it says "The Cancer Society's report linking cigarettes to a shortened life brings resolutions and jokes," right?
A. Yes, sir.
Q. That's what it says?
A. Right.
Q. Okay. Do you recall seeing this article back in the 1950s?
A. No, sir.
Q. Is it probable that you did see it because you like to look at the pictures?
A. It's a possibility.
Q. Certainly when you've looked through "Life" magazine, you didn't look only at the advertisements; you looked at the articles and pictures that went with the articles, too, isn't that true?
A. I would look at different pictures like during the war, the war pictures.
Q. Sure. And you'd also look at the articles and the drawings and the --

A. I probably may have glanced by those.
Q. I'm sorry?
A. I probably may have glanced at them.
Q. Let me show you Exhibit Number 26.
And that again is another "Life" magazine, is that right?
A. Um-hmm.
Q. And it's dated June 11th, 1956, right?
A. I can't see the date on this, no, sir.
Q. Okay. Okay. If you turn to Page -- I think it's Page 126, it says "New cigarette cancer link. Study shows that as the smoking rates rise, lung damage rises, too."
Right?
A. Yes, sir.
Q. Okay. And then on the next page, it talks about how cancers are born and grow and invade the lungs, right?
A. Yes, sir.

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Q. Okay. And it's got pictures in there?
A. Yes, sir.
Q. Did you look at those pictures when you were looking through the pictures of "Life" magazine back in the 1950s?
A. I don't remember.
Q. You don't remember whether you saw this one?
A. I can't recall specifically, no, sir.
Q. How about Exhibit Number 27?

And that, that's a "Life" magazine from April 22nd, 1957, right?
A. Yes, sir.
Q. Okay. And if you turn to Page 123, right?
A. Yes, sir.
Q. It says "A clue in the studies of smoking dangers," right?
A. Yes, sir.
Q. And again there's some big pictures there and some pictures of people doing experiments with mice, right?
A. Yes, sir.
Q. Okay. Now, when you were flipping through the pictures in "Life" magazine back in the 1950s, did you look at this article?
A. I don't recall.
Q. It's possible you did; you just don't recall?
A. I don't recall. No.
Q. I'm going to show you what we've marked as Exhibit Number 28.
And this is a collection of articles from "Time" magazine, Mr. Tompkin, and I'd like to go through it with you and see whether you ever have a recollection of seeing any of these articles.
Okay?
Okay. The first one is December 22nd, 1952.

Do you see that? The sticker is right over where the date is --
A. Just down here.
Q. -- on your copy.
A. Now I see it, yes, sir.
Q. And the article there is called Smoking and Cancer, do you see that?
A. Yes, sir.
Q. Do you have a recollection of seeing this article back in the 1950s?
A. No, sir.
Q. You read "Time" magazine at that time, didn't you?
A. "Time" magazine, very, very little.
Q. Once in awhile you saw it?
A. Yes. Very --
Q. Take a look at the next page on that. And that's November 30th, 1953.
Do you see that? Can't make it out?
A. Yeah. This is very small on this.
Q. Here it says -- the title on this article is "Beyond any doubt," right? Do you see that up at the top?
A. Up at the top, yes, sir.
Q. It says "For cigarette smokers, famed surgeon Evarts Graham of St. Louis had news last week," right?
A. Yes.

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Q. And it says "Dr. Ernst Wynder and I have reproduced cancer experimentally in animals by using merely the tars from tobacco smoke. This shows conclusively that there is something in cigarette smoke which can produce cancer."

That's what it says, right?

A. Yes, sir.

Q. Did you read this article at the time?

A. Not that I recall.

Q. Okay. It's got a picture of the researchers here, right?

A. Um-hmm.

Q. Did you look at the pictures?

A. I don't recall.

Q. The next two pages are all part of that same article, so why don't you turn to the next article.

Yes, that's it. It's dated July 5th, 1954, right?

A. Yes, sir.

Q. Okay. And the article, the title on this one is Smoking and Cancer, isn't that right?

A. Yes, sir.

Q. Okay. And it shows again a picture of the researchers, right?

A. Um-hmm.

Q. Okay. And it's an article about a study done by the

American Cancer Society, isn't that right?

A. Yes, sir.

Q. Okay. Now, did you see this article at the time?

A. I don't recall.

Q. Don't recall.

Turn to the next article which it's dated April 1st, 1957.

A. Um-hmm.

Q. Do you see that article?

A. Yes, sir.

Q. Okay. It's entitled Smoking and Cancer Continued, right?

A. Yes, sir.

Q. Did you read that article at the time?

A. Not that I recall, no.

Q. All right. Let's turn the page again.

It's another article from "Time," June 17th, 1957, right?

A. Yes.

Q. Okay. And it's entitled "Smoking and health," right?

A. Down at the bottom? Yes, sir.

Q. Okay. And there's a chart here, there's two charts, one that says smokers' death rate, right? You see the chart in the middle of the page?

A. Oh, yes, sir.

Q. And it says "causes of excess deaths," do you see that?

A. Yes.

Q. Did you see that article at the time?

A. Not that I recall.

Q. And you may have; you just don't remember, right?

A. I don't remember, no.

Q. Flip to the next article. It's July 22nd, 1957.

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That's it.
A. Um-hmm.
Q. And that's called Smoking and Cancer, isn't that right? On the upper left?
A. Yes, sir.
Q. Okay. Did you see that article at the time?
A. Not that I recall.
Q. No recollection?
A. No, sir.
Q. Flip the page, and you'll see an article from "Time" on May 5th, 1958, right?
A. Yes, sir.
Q. Okay. And that's titled smoking and cancer, right?
A. Yes.
Q. Okay. Did you see this article at the time?
A. Not that I recall.
Q. So you may have; you just don't remember?

A. I don't remember.
Q. Flip two pages, you'll come to the next article, July 14th, 1958.
A. Okay. Yes.
Q. All right. That's the date on that article?
A. Yes.
Q. July 14th, '58?
A. Yes.
Q. Smoking and Cancer is the title on that one, right?
A. Right.
Q. Okay. Did you see this article at the time?
A. Not that I recall, no.
Q. So you may have; you just don't --
A. I don't recall.
Q. Okay. Turn the page and you'll see another article, January 12th, 1959. Do you see that?
A. Yes.
Q. And that's another article called Smoking and Cancer, right?
A. Yes, sir.
Q. Okay. Did you see this article at the time?
A. Not that I recall.
Q. You may have; you just don't remember?
A. Don't remember.
Q. Turn the page and you'll see another article,

April 27th, 1959, right?
A. Yes, sir.
Q. Again from "Time" magazine, right?
A. Yes.
Q. Okay. And this one again is called Smoking and Cancer Continued, right?
A. Yes, sir.
Q. Did you see that article at the time?
A. Not that I recall.
Q. No recollection?
A. No, sir.
Q. Flip the page to another article, December 14th, 1959.
A. Yes.
Q. Do you see that? And that's called Smoking and Cancer continued, too, isn't it?
A. Yes.

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Q. Did you see that article?
A. Not that I recall.
Q. Okay. Flip the page. You see another article dated July 6th of 1962.
Do you see that?
A. Yes.
Q. It says "The danger of smoking, more than cancer," do you see that?

A. Yes, sir.
Q. Did you see that article at the time?
A. Not that I recall.
Q. You may have; you just don't remember?
A. Don't remember, no.
Q. Flip the page, you'll see another article, December 13th, 1963.
A. Yes.
Q. It says "Research: The most exhaustive survey on smoking and disease." Is that what it says?
A. Yes.
Q. That's the title of the article?
A. Right.
Q. Did you see that article at the time?
A. No, not that I recall.
Q. No recollection?
A. No, sir.
Q. You may have, but you don't recall?
A. I just don't recall it, no, sir.
Q. Now, I think you said you had "Reader's Digest" in the home while you were growing up, right?
A. Yes.
Q. And you and Mrs. Tompkin subscribed to "Reader's Digest"?
A. Yes.

Q. Is that right?
Did you ever see any articles in "Reader's Digest" about smoking and health?
A. Not that I recall, no.
Q. Defendant's Exhibit 29, and this is an article from "Reader's Digest" in January, 1950, isn't that right?
A. Yes, sir.
Q. Okay. And it's entitled "How harmful are cigarettes," right?
A. Yes, sir.
Q. And it says, "A "Reader's Digest" report to consumers, latest facts and figures about American's growing tobacco habit, 400 billion cigarettes a year," right?
A. Yes.
Q. Did you see that article at the time?
A. Not that I recall.
Q. You may have, you just don't remember?
A. I don't remember, no, sir.
Q. Take a look at Exhibit Number 30.
That's another article from "Reader's Digest," isn't that right?
A. Yes, sir.
Q. Okay. And it's dated April, 1950, right?
A. Yes. Somebody wrote it in down here, yes.

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Q. Okay. And it says -- this is a special encore session, isn't that right? That's what it says up at the very top on the left-hand side, right?
A. Yes.
Q. Okay. And it's -- it's referring back to the last article, how harmful are cigarettes, isn't that right? See where it says how harmful are cigarettes?
A. Okay.
Q. And it says, "The article on this subject in the January "Digest" aroused more discussion and approval than any recent magazine feature."
That's what it says right up there on the very top, right?
A. Yes.
Q. Okay. Now, do you recall seeing this article at the time?
A. No, sir.
Q. You may have; you just don't remember?
A. I don't remember, no, sir.
Q. Let me show you Exhibit Number 31.
It's another article from "Reader's Digest," right?
A. Yes.
Q. And it's from December, 1952, right?
A. Yes.

Q. And it's called "Cancer by the carton," right?
A. Yes.
Q. Okay. Now, you heard about this article, didn't you?
A. Not that I remember.
Q. No recollection of ever hearing about this article?
A. No, sir.
Q. Again, you may have; you just don't recall?
A. No.
Q. Let me show you Exhibit Number 32.
Another "Reader's Digest" article from July, 1954, right?
A. Yes.
Q. Okay. It's called "The facts behind the cigarette controversy," right?
A. Yes, sir.
Q. And up at the top it says "How large a part does smoking play in the alarming increase in lung cancer," right?
A. Yes, sir.
Q. Okay. Did you see this article at the time?
A. Not that I recall.
Q. You may have; you just don't recall?
A. I just don't remember, no, sir.
Q. Here's another article, it's Exhibit Number 33.
And this article is dated November, 1954,

right?
A. Yes. It's written in at the bottom.
Q. Okay. And it's called "How I stopped," right?
A. Yes.
Q. It's about smoking, right?
A. Yes.
Q. Okay. Did you read this article at the time?
A. Not that I recall, no.

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Q. You may have; you just don't remember?
A. I just don't remember, no.
Q. Mr. Tompkin, we have just taken another short break, and are you ready to proceed?
A. Yes.
Q. Now, I understand from what you told us last week that your parents had the "Beacon Journal" in your house when you were growing up, right?
A. Yes, sir.
Q. And you would read the paper from time to time?
A. From time to time, yes, sir.
Q. And you and Mrs. Tompkin also subscribe to the "Beacon Journal," isn't that right?
A. Yes, sir.
Q. Okay. And since you have been married, you have read the "Beacon Journal" everyday, isn't that true?
A. I'm -- not everyday, no, sir.

Q. You didn't read it on a daily basis?
A. As -- as best that -- I do today. Back then it was probably not everyday.
Q. Isn't it true, to the best of your recollection, you've read the "Beacon Journal" on a daily basis ever since you've been married to Mrs. Tompkin?
A. Daily, yes. But there's days when you don't read the paper, okay?
Q. Sure. But by and large ever since you've been read you -- ever since you've been married in 1955 you've read the "Beacon Journal" on a daily basis, correct?
A. Not daily, but every -- but as best to daily as I could get, yes. There's days when you don't read the paper.
Q. But generally you read it everyday?
A. Do -- generally, yes.
Q. Okay. Now, let me show you -- we've marked this as Defendant's Exhibit 34.
And it's an article from the "Beacon Journal" and it's dated July -- December 12th, 1952, right? The date is up in the upper right-hand corner.
A. Oh, okay. Yes, sir.
Q. Okay. And it says "Find lung cancer deaths mount as smoking increases."
Now, do you have a recollection of seeing

this article at the time, sir?
A. No, sir.
Q. You may have; you just don't recall?
A. I do not recall, no, sir.
Q. Take a look at Defendant's Exhibit Number 35.
And this is another article from the "Beacon Journal" and the date is June 21st, 1954, right?
A. Yes, sir.
Q. And right in the middle of the page there's an article, it's front page, right?
A. Yes.
Q. It would be hard to miss a front page story, right?
A. Well, sometimes. And sometimes not.
Q. Okay. And it says, front page story says "Men 50 to 70 die sooner of smoking."
Do you see that?
A. Yes, sir.

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Q. Did you see this article at the time?
A. Not that I recall.
Q. You may have; you just don't remember?
A. I do not remember, no, sir.
Q. Take a look at Defendant's Exhibit Number 36.
And this is from the "Beacon Journal" and the date is June 22nd, 1954, and the article's called "Report death risk for smokers high."

Do you see that?
A. Yes, sir.
Q. Okay. Did you read that article at the time?
A. Not that I recall, no.
Q. So you may have; you just don't remember?
A. I don't remember, no.
Q. Let me show you Defendant's Exhibit Number 37.
This is an article from the "Beacon Journal" dated December 1st, 1955. Do you see that in the upper right-hand corner.
A. Yes, sir.
Q. Okay. And on the left-hand side halfway down the page there is a story -- sorry -- story that says "Believe lung ailment due to cigarettes," right?
A. Yes, sir.
Q. Did you see that article at the time?
A. Not that I recall.
Q. So you may have; you just don't remember?
A. I do not remember, no, sir.
Q. I will show you Defendant's Exhibit Number 38, and this is another story from the "Beacon Journal" and it's March, '57 but I don't know -- March of 1957 but I don't know the exact date.
But you see on the right-hand side there it says "New study"?

A. Yes, sir.
Q. "Ties cancer and cigarettes."
Did you see that study or that article?
A. Not that I recall, no.
Q. So you may have; you just don't remember?
A. Yes, sir.
Q. It's a general practice to read the newspaper everyday, right?
A. It's --
Q. All right. Let me show you Defendant's Exhibit Number 39.
It's another story from the "Beacon Journal," June 4th, 1957, right?
A. Yes.
Q. And this is another front page story, isn't that right?
A. Yes, sir.
Q. It says "Cancer Society survey says cigarettes up cancer deaths by 1,000%," do you see that?
A. Yes, sir.
Q. Okay. Did you see that story at the time?
A. I don't recall.
Q. So you may have, you just don't remember?
A. I just don't remember, no.
Q. Let me show you Defendant's Exhibit 40.

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And this is a story from the "Beacon Journal" dated June 5th, 1957, and on the left it says "U.S. studies report on cigarettes."

Do you see that?

A. Yes, sir.

Q. Did you see that article at the time?

A. Not that I recall, no.

Q. So you may have; you just don't remember?

A. I do not remember, no.

Q. There's an article, Exhibit 41, July 31st, 1957, right?

A. Yes.

Q. And it's another front page story, right?

A. Yes.

Q. On the left it says "You want to quit smoking."

Do you see that?

A. Yes, sir.

Q. Did you read that story?

A. I don't recall, no, sir.

Q. So you may have; you just don't recall?

A. No, sir.

Q. Let me show you Defendant's Exhibit Number 42 and it's a July, 1959 story.

A. If that's a 9, yes.

Q. And the title on the upper right of the story is

what?

A. "Link cigarettes to higher death rate."

Q. Okay. Did you read that article at the time?

A. Not that I recall.

Q. You may have; you just don't remember?

A. I do not remember, no.

Q. I've shown you a series of articles from "Time," "Life," "Reader's Digest" and the "Akron Beacon," right?

A. Yes, sir.

Q. And you read all those articles in the 1950s?

Did you read the publications "Time" magazine, "Life" magazine, "Reader's Digest" and the "Beacon Journal"?

Did you read all those publications?

A. During the 1950s?

Q. Yes.

A. Sporadically, yes.

Q. And it's likely you would have seen articles in one of those publications about smoking and health, and specifically smoking and lung cancer, isn't that true?

A. I don't know.

Q. You don't know.

MR. RILEY: I have no further questions.

THE COURT: All right. We will stop right here.

The Court has a criminal matter it needs to take care of at this time.

We will be in recess for about 15 minutes.

You may file out.

(Jury out).

(Recess taken)

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THE COURT: Can you continue with the deposition.

BY MR. CARTY:

Q Good afternoon, Mr. Tompkin. I've previously introduced myself to you. My name is Patrick Carty and I represent Liggett Group, one of the defendants here.

Mr. Tompkin, you have already indicated your deposition was taken in this case last week?

A Yes.

Q And you've already testified earlier that you were you understood that you gave sworn testimony at that deposition, correct?

A Yes.

Q And by sworn testimony you understood, did you not, that you are your answers were to be truthful and honest?

A To the best at that time, yes.

Q You also understand that your answers were supposed to be complete and accurate?

A At that time, yes, sir.

Q Mr. Tompkin, at your deposition, am I correct that you swore that from 1965 that -- pardon me -- 1960 to 1965 the only cigarette you smoked on a regular basis was Kent cigarette, correct?

A Yes, sir.

Q And therefore, you'll agree that at that time you

testified that you did not smoke any other cigarette on a regular basis, other than Kent cigarette, correct?

A At that time, yes.

Q Mr. Tompkin, at the time that you testified that you smoked Kent cigarettes from 1960 to 1965, you believed that that testimony was complete and accurate, correct?

A At that time, yes.

Q Mr. Tompkin, I'm going to show you what has previously been marked as Defendant's Exhibit 2. You've seen this document before, haven't you?

A Yes, sir.

Q And would you agree that this document is a voluntary disclosure of the plaintiff?

A Yes.

Q And by that, this document gives information to the defendants about you, correct?

A Yes.

Q Now Mr. Tompkin, as you look through the document you do you see there are certain handwritten notations on the

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document, correct?
A Yes, sir.
Q I believe you testified those are your handwritten notations?
A Yes, sir.
Q And these changes were made prior to your deposition

on November 7th, 1994, correct?
A Yes.
Q And I believe you testified that you made these changes after you and your wife looked over the document, correct?
A Yes, sir.
Q And you made these changes because you wanted to correct inaccuracies in the document?
A Yes, sir.
Q Mr. Tompkin, if you turn to page 4, section 7. Do you see a section 7 that's entitled Smoking History on page 4?
A Yes.
Q And it continues on to page 5?
A Yes.
Q And am I correct, Mr. Tompkin, that the smoking history section contains no changes by you?
A Yes, sir.
Q Looking at the top of page 5, Mr. Tompkin. Doesn't this document indicate that from 1960 to 1965 you were smoking two to three packs a day of Kent cigarettes?
A Yes, sir.
Q Am I correct, the document does not indicate that during that time from 1960 to 1965 you were smoking Lark cigarettes?
A I did not remember Lark cigarettes at that time, no,

sir.
Q I beg your pardon?
A When I had made this out I had forgotten about Lark cigarettes.
Q I understand at the time you reviewed this prior to your deposition you understood it was complete and accurate, correct?
A At that time, yes.
Q And am I correct that you were also asked at your deposition whether there were any additional changes you wanted to make, and you indicated that there were no such changes you wanted to make.
Do you remember giving that testimony?
A If that's what it says, yes.
Q So am I correct, Mr. Tompkin, that at the time of your deposition, you believed that the statement that you smoked Kent cigarettes from 1960 to 1965 was an accurate statement?
A Yes.
Q Mr. Tompkin, am I also correct that in your deposition, you testified that at the time you quit in 1965 you were smoking Kent cigarettes?
A Yes, sir.
Q And at the time you testified that you were smoking Kent in 1965 when you quit, you believed at that time that was an accurate statement, correct?

A Yes, sir.

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Q Mr. Tompkin, at your deposition, do you recall you were asked a series of questions about certain advertising, cigarette advertising that you recalled?
A Yes.
Q And you identified certain cigarette advertisements that you recalled, correct?
A Yes.
Q And at that time, you did not identify a Lark advertisement, am I correct?
A I didn't see any.
Q Okay. So the answer is you did not recall any Lark advertisement, correct?
A Right.
Q Mr. Tompkin, since your deposition last week, you've met with your attorneys to prepare for your testimony today?
A Yes, sir.
Q Am I correct that you met with your attorneys yesterday to prepare your testimony today?
A Yes, sir.
Q And am I correct that your attorney showed you certain cigarette advertisements yesterday to prepare your testimony today?
A Yes, sir.
Q And am I also correct that you saw certain Lark

advertisements at that time?
A Yes, sir.
Q And Mr. Tompkin, isn't it a fact that yesterday was the first time you discovered during this meeting that you smoked Lark cigarettes?
A No, sir.
Q When was the first time you discovered that you smoked Lark cigarettes?
A Wednesday evening.
Q And when was the first time you told your attorneys you smoked Lark cigarettes?
A Yesterday.
MR. CARTY: I have no further questions, thank you.
MS. BIXENSTINE: No Questions for R.J. Reynolds.
MR. COFER: This is Walt Cofer. No questions for Philip Morris, no questions for Lorillard.

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REDIRECT EXAMINATION

BY MR. SMITH:
Q Dave, back in the time when you smoked, were you aware of cigarette advertisements?
A Yes, sir.
Q Can you tell us whether or not you were aware of

whether important or well known people were in some of these cigarette ads?
A Yes, sir.
Q And by yes sir you meant what?
A Movie stars.
Q Were in the ads?
A Yes.
Q What was your view of smoking when you began smoking in the '50's, when you began smoking regularly, what did you think about it?

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A I just started smoking cigarettes. The older people were smoking the cigarettes.
Q Can you tell us whether or not when you began smoking you thought it was harmful?
A I didn't believe it was harmful, no, not when I started.
Q There has been talk about your looking at certain ads which we have provided you, we as your attorneys have provided you with certain books to look at that contained ads regarding cigarettes, is that correct?
A Yes, sir.
Q I'm going to hand you what has been marked as Plaintiff's Exhibit 65, 66, 67, 68 and 69.
I want to ask you, first of all, have you seen these books?

A Yes, sir.
Q And the ads that you have testified to today are ads that you have selected from those books, is that correct?
A Yes, sir.
Q There was also testimony regarding Lark cigarettes. And you indicated that you saw an ad for Lark cigarettes on Wednesday night, is that correct?
A Yes, sir.
Q Where were you when you saw that ad?
A At home in our -- my kitchen or our kitchen.
Q Who was with you at that time?
A I was by myself when I went through the book.
Q None of the lawyers were in the -- your house at that time, is that correct?
A No. No, sir.
Q And that's when you became aware of the Lark cigarette factor that you have testified to here, is that the truth?
You saw Lark cigarette ads Wednesday night, you've indicated, in your kitchen, is that correct?
A Yes, sir.
Q And you smoked Lark cigarettes for what years?
A '64 through '65.
Q As best you sit here today is that true?
A Best as I sit here today, yes, it is true.
Q Now there's been testimony built in direct and cross

examination about your going to Herbert Tareyton, Kents and Larks, is that correct.
A Yes, sir.
Q Why did you go to Herbert Tareytons?
A Safety factor.
Q Why? What about them made you think there was a safety factor in Herbert Tareytons?
A They were saying that you filter out through the charcoal filter.
Q Why did you go to Kent cigarettes?
A The micronite filter said it was to filter out the harmful tars, nicotines, et cetera.
Q So what did you think it would do for you, if anything?
A Give me -- probably give me some protection.
Q Is that why you went to Kents?
A I would say yes.
Q How about when you went to Larks? Why did you go to Lark cigarettes, Dave?

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A It would be for the same thing, a health factor.
Q What was there about Larks that made you think there was a health factor assistance?
A From the ad I saw, it was the outer filters and inner filter of charcoal.
Q That's all I have.

RECROSS EXAMINATION

BY MR. COFER:
Q Mr. Tompkin, my name is Walter Cofer and I have a couple followup questions.
You began smoking Herbert Tareyton, you told us, in 1959, is that correct, sir?
A Yes, sir.
Q And on redirect examination you just told us the reason that you switched to Herbert Tareytons was because of the safety factor, correct?
A Yes.
Q What about unfiltered cigarettes was unsafe?
A I would say the advertising was leading you towards the filter.
Q Forget about the advertising, what about unfiltered cigarettes was unsafe?
A Health factors.
Q Specifically what health factors?
A The filter is telling you it's taking out all the harmful things that's going into your lungs and so forth.
Q And in 1959 you knew there were harmful things that would go into your lungs from smoking unfiltered cigarettes, correct?
A I can't say that for a fact. I don't recall.
Q Well, you were smoking unfiltered cigarettes in 1959

before you switched to Herbert Tareyton, correct?
A Yes.
Q You switched to Herbert Tareyton because of the safety factor the filter offered, correct?
A I would say yes.
Q You believed that filter would take out the harmful ingredients that you would breathe into your lungs, correct?
A That's what the advertising said, yes.
Q And you believed that, right?
A Well, they led me to believe it, yes.
Q And you believed it and that's why you switched to a filtered cigarette in 1959, correct?
A If I had -- oh yes.
Q When was the first time you became concerned about the unhealthful ingredients in cigarette smoke?
A I don't recall.
Q It was obviously before 1959?
A That's a possibility.
Q Well, it was before you switched to a filtered cigarette, right?
A That's possible.
Q Because the reason you switched to a filter cigarette you wanted to avoid the those unhealthy ingredients you were breathing into your lungs, right?
A Yes, sir.

Q Earlier, Mr. Tompkin, you told us that you began

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smoking Kent cigarettes in 1961, is that right?
A Yes, sir.
Q And your counsel showed you a series of advertisements that he marked as Plaintiff's Exhibits 18, 19, 20, 21 22, 23, 24, 25, and 26, correct?
A The blue books and that? That would be yes.
MR. COFER: Do we have those advertisements? Those would be 18 through 26.
Q Would you please just glance at those, Mr. Tompkin?
A Yes, sir.
Q Could you just glance through all of them, please?
A Yes, sir.
Q Plaintiff's Exhibits 18 through 36 are a series of Kent ads you testified earlier you recall seeing, is that right?
A Yes, sir.
Q On those ads in someone's handwriting are dates?
A Yes, sir.
Q Presumably those are the dates the ads ran?
A I presume.
Q Is that your handwriting?
A No, sir.
Q Do you know whose handwriting that is?
A No, sir.

Q Do you have any recollection, other than the handwritten information, the dates that those specific ads were ran?
A No, sir.
Q Now if you saw those ads, you saw them in magazines or on television, right?
A TV. If it was on TV, yes, I would have seen them.
Q Or you saw them in magazines?
A Yes, sir.
Q And you would have seen them at or about the time that the company ran those advertisements, right?
A Yes, sir.
Q Would you hand me those ads, please?
Plaintiff's Exhibit 18 says, "Kent, the one cigarette that can show you proof of greater health protection."
Handwritten at the bottom is Life, September 14, 1953." Is that correct?
A Yes, sir.
Q Did you have a recollection of seeing that ad in approximately 1953?
A If that's when it appeared, I would have seen it then.
Q What health protection was that advertisement referring to?
A Whatever it was saying down below here.

Q What was it about cigarette smoking that in 1953 you believed could be unhealthful?
A I didn't say in 1953 that I believed it was --
Q But you saw that ad right?
A Yes, I saw the ad.
MR. SMITH: Excuse me. He didn't say he saw the ad in 1953.
BY MR. COFER:
Q Okay. If I misunderstood your testimony, I apologize, sir.

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You say you saw the ads when they were run in magazines?
A Yes, sir.
Q And if in fact that was run in 1953 that would have been the time you saw that ad, correct?
A It's possible.
Q Because you said you have a recollection of seeing that advertisement before your lawyer showed it to you, is that right?
A Yes, sir.
Q In-between the time this lawsuit was filed and you stopped smoking cigarettes, did you ever go to an archive someplace or library and look at old cigarette ads?
A No, sir.
Q So the only time you would have seen cigarette ads

when they were published in various media, right?
A Yes.
Q Or when your lawyer showed them to you?
A Yes.
Q And you had a recollection of seeing this ad before your lawyer showed it to you, right?
A Yes, sir.
Q So you would have seen that ad at or about the time it was published in the media, right?
A Yes, sir.
Q Now, looking at that ad, it says that Kent cigarettes officer health protection, right?
A Yes, sir.
Q And you would have seen that when that was published, correct?
A That would have been, yes, sir.
Q What kind of health protection, what concern was there with respect to cigarette smoking that that ad could have been referring to in your mind?
A I can't recall.
Q I'm going to hand you Exhibits 19 through 26, and I'd ask you to look through those, please.
Have you had an opportunity to glance at those?
A Yes, sir.
Q Other than the dates which are handwritten on those

exhibits, can you tell me from your own recollection when was the first time you saw any of those advertisements?
A I saw those advertisements when they came out.
Q Did you have a specific recollection -- let's start with Plaintiff's Exhibit 19, please?
A Yes.
Q I think you are looking at 18?
A This is 19.
Q You have 19. Do you recall when you first saw that ad?
A No, sir.
Q Do you recall where you saw that ad?
A It would have been in a magazine.
Q And you assume you must have seen it when it first came out, right?
A I would assume.
Q Okay. Turn to exhibit 20, please.
Do you have a specific recollection when you first saw that ad?

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A Not a specific recollection, no, sir.
Q Did you have a recollection where you first saw that ad?
A No, sir.
Q But you assume it must have been when that ad was first run, correct?

A Yes, sir.
Q I believe the next one is Exhibit 21?
A Yes, sir.
Q Do you have a specific recollection of when you first saw that ad?
A No, sir.
Q Do you know where you first saw that ad?
A No, sir.
Q But you assume that it must have been when it was first run, right?
A Right.
Q What does that take us to 22, is that the next exhibit?
A Yes, sir.
Q Do you have a recollection when you first saw that ad, Mr. Tompkin?
A No, sir.
Q Do you have a recollection where you first saw that ad?
A No, sir.
Q But you assume you first saw it when it was run, correct?
A Correct.
Q What's the next exhibit, sir?
A 23.

Q Do you have a specific recollection of when you first saw that ad?
A No, sir.
Q Do you have a specific recollection where you first saw that ad?
A No, sir.
Q But you assume you saw that ad when it was first run, correct?
A Correct.
Q What's the next one.
A 24.
Q Do you have a specific recollection when you first saw that ad?
A No, sir.
Q Do you have a specific recollection where you first saw that ad?
A No, sir.
Q But it is your assumption today that you saw that ad when it was first run, correct?
A Yes, sir.
Q And now finally I want to ask you about Plaintiff's Exhibit 25. Do you have a specific recollection of when you first saw that ad?
A No, sir.
Q Do you have a specific recollection where you first

saw that ad?

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A No, sir.
Q But you assume you saw that ad at or about the time it was first run, correct?
A Yes, sir.
Q And you told us earlier that for all the ads reflected in Plaintiff's Exhibit 18, 19, 20, 21, 22, 23, 24 and 25, that you saw those ads before you began smoking Kent cigarettes, right?
A Yes, I did.
Q And you began smoking Kent cigarettes in 1961?
A Yes, sir.
MR. COFER: That's all I have.
Thank you very much, Mr. Tompkin.
MR. SMITH: Any other defense counsel have any questions?
BY MR. RILEY:
Q Mr. Tompkin, were you aware of an association between smoking and lung cancer in the 1950s?
A Was I aware?
Q Yes, sir?
A No, sir.
Q So the reason you switched to Herbert Tareyton had nothing to do with the fear of lung cancer, is that right?
A Yes.

MR. RILEY: That's all I have.
MR. SMITH: Anyone else have any other questions?
You all pass?
THE COURT: That concludes the deposition.
Plaintiff may call its next witness.
MR. SMITH: Dr. Haas, your Honor.
ANDREW JOHN HAAS
called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:
THE COURT: Please be seated.
You may proceed.
DIRECT EXAMINATION
BY MR. SMITH:
Q Will you state your name please, sir?
A Andrew John Haas, Jr .
Q And your occupation, please?
A I'm a physician.
Q Dr. Haas, your office address, please?
A My current office address is 224 West Exchange Street, Suite 160, Akron, Ohio, 44302.
Q That's down near Akron General Hospital, is that true?
A Correct.
Q And your residence address, please?

A My residence.
THE COURT: That's not necessary, unless the parties need to know it.
MR. SMITH: Thank you, your Honor.
Q Would you tell us please where you went to medical school?
A I graduated from Loyola Stritch School of Medicine, Chicago, Illinois.
Q And that was in what year, sir?
A 1997, I'm sorry excuse me, 1977.

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Q And your internship, please?
A My internship was at the University of Illinois.
Q And your residency program?
A University of Illinois.
Q And just briefly, a residency program for a doctor is what?
A Well, there is multiple different types of residency. The particular residency that I took was in the discipline of internal medicine.
Q And the reason you take a residency is for what reason?
A Well, the purposes of the residency is further training in that specific discipline so you become basically an expert in the particular field.
Q What did you then do, Dr. Haas?

A After I completed my residency I did a fellowship in the discipline of medical oncology.
Q And what is medical oncology?
A Medical oncology is the study and treatment of individuals, patients with cancer.
Q And where did you do your residency, please, or your fellowship?
A University of Illinois.
Q What did you then do, Dr. Haas?
A After I completed my training, I came back to the Akron area and have been in practice since that time.
Q Your family has been a long time as well, is that correct?
A Yes.
Q You have a father and uncle that were dentists in fact?
A Orthodontist.
Q Orthodontist, I apologize.
Are you Board Certified?
A Yes.
Q And you are Board Certified in what, sir?
A I'm Board Certified in the disciplines of internal medicine and medical oncology.
Q Dr. Haas, I want to direct your attention to June the 25th, 1992?

A All right. Are you sure it's not June 26th.
Q I apologize, it is June 26th, forgive me.
Did you have occasion to meet David Tompkin at that time?
A Yes.
Q And the purpose of that visit?
A Doctor, or excuse me Mr. Tompkin was sen to me for the purposes of consultation.
Q Within your specialty of oncology?
A Yes.
Q Did you examine and obtain a history from David Tompkin at that time?
A Yes.
Q Did you come to a diagnosis of his conclusion of his condition?
A Yes.
Q And what was that diagnosis?
A This patient had lung cancer.
Q Did you prescribe a course of treatment for his lung

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cancer?
A Yes.
Q And what was that, please?
And forgive me I want to interrupt you for one second.
Was your diagnosis based upon reasonable medical

certain?
A Yes.
Q And I ask you, any question that I should ask you today that should call for an opinion, Dr. Haas, I would request that you base it upon reasonable medical certainty, okay, sir?
A Yes, absolutely.
Q Forgive me if you would pick up at the treatment, please?
A Mr. Tompkins had what we would call stage 3-A non small cell lung cancer.
Q Would you please tell the court and the jury what that means, particularly what first, the stage 3 part?
A Okay. Basically when I see patients with cancer, we undertake a process called staging a disease. The purpose of staging is a twofold one, it determines the type of therapy we recommend and, more importantly, it determines the prognosis.
Stage 3, non small cell lung cancer is a relatively advanced stage of cancer. And in 1992, the exact treatment was, and unfortunately still is somewhat problematic. But the treatment recommendation for this particular individual was at least a combination of chemotherapy and radiation therapy and possibly surgical intervention.

Q Dr. Haas, before a cancer arrives at a stage 3 level, does it have to pass through stage 1 and stage 2?
A In terms of the kinetics of cancer, yes, cancer starts in a subclinical status and evolves and eventually becomes at the time that we are able to detect it. Sometimes we detect patient's with early stage cancers, unfortunately the situation was with Mr. Tompkin was more the common experience, which is we see cancer in the advanced stage.
Q I interrupted you as you were going through the rest of that particular definition, the non small cell?
A Yes.
Q If you would tell us about that, please?
A What particularly?
Q Just what does that mean to a physician, to an oncologist?
A There are many what we call histological paths to lung cancer, different types of lung cancer based on there are morphological appearance of what they look like.
For lung cancer, as a medical oncologist, there are four basically principal types we are concerned with, there are other histological paths; they tend to be the minority of patient population. The four principal types we see are called small cell lung cancer, adenocarcinoma, large cell carcinoma, and squamous cell carcinoma.
THE COURT: How do you spell that last?

THE WITNESS: S-Q-U-A-M-O-U-S. Squamous cell

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carcinoma.
A The three cell types. Adenocarcinomas, squamous cell, and large cell carcinoma are generally grouped together and called non small cell because the treatments we render these patients are basically the same. We don't make distinctions in treatments based on those particular histologist.

Small cell lung cancer is a different clinical entity, and has a different approach as to how we treat patients.

Q Thank you very much. And if you take up again with the treatment, please, that was rendered here?

A Basically what we did with Mr. Tompkin is that we started with chemotherapy and combination with radiation therapy. After several cycles of chemotherapy and completion of initial phases of radiation therapy he was referred to Dr. Netzley, my guess who will be testifying later today. The patient had a surgical expiration recession of all residual disease, had subsequent post-operative chemotherapy and radiation therapy. At least his initial phase of treatment.

Q Then what happened, please?

A Well, he was rendered no evidence of disease after the surgical resection. And maintained remission for a period, I want to say, approximately -- oh here, let me look at my

notes.

The surgery occurred in the fall of 1992. His subsequent chemotherapy was completed. And then I have in my note, December 28th, 1993 that there was concern at that time that he had relapse of his disease. At which time he underwent further diagnostic evaluation; was deemed to have recurrence. Because at this time, unfortunately, there was no evidence or -- unfortunately at this time there is no curative therapy that could be rendered.

And since the patient was relatively asymptomatic, by that I mean he was able to work and we were able to follow the patient. And it was only a year later that the disease became active and that the patient was symptomatic, and then at that time underwent a palliate therapy, received that for approximately a year, had progression of his disease. The decision was made for hospice care. And the patient ultimately expired, I guess, February 12th, 1996.

Q But you were able to buy him some additional time with residual treatment?

A Yes. If you look historically these patient do very poorly, but if you consider he was diagnosed in 1992, and had in excessive of three and a half years of survivorship with our treatments.

Q Dr. Haas, do you have an opinion based upon reasonable

medical certainty as to the cause of his lung cancer?

A Based on reasonable medical certainty, yes, I think that Mr. Tompkin's malignancy arose from cigarette smoking.

Q And would that same opinion apply as to the cause of his death?

A Mr. Tompkin died from lung cancer. So it arose from cigarette smoking.

Q I believe the bills have been stipulated to, is that correct?

MR. McLAUGHLIN: We stipulate those bills, your

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Honor.
THE COURT: Very well.
MR. SMITH: And just for the record, there are contained in Exhibit 8900 point 001, and they -- the total medical expenses are $110,527.45.
Thank you very much.
THE COURT: You may cross.
MR. McLAUGHLIN: Thank you, your Honor.

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CROSS EXAMINATION

BY MR. McLAUGHLIN:
Q Good morning, Dr. Haas?
A Good morning.
Q We met before, four years ago briefly, and I think I reintroduced myself to you this morning early before the court began. And I'm Patrick McLaughlin, and in this case I represent the Lorillard Tobacco Company.

Now, I think from your testimony, doctor, we understand that you provided care and treatment to David Tompkin after the diagnosis of what you call lung cancer?
A Yes.
Q Do you agree that David Tompkin had adenocarcinoma of the lung?
A Based on his initial diagnosis, based on the final autopsy report, yes, it was adenocarcinoma.
Q Now doctor, just a couple housekeeping matters.
You are not here to testify as an expert in epidemiology, are you?
A No.
Q And you are not here to testify as an expert in pathology?
A No.
Q In fact, you are here as a treating physician for Mr. Tompkin and not as an expert witness, right?
A I'm.
THE COURT: Well, let the court interrupt here. There was a dispute with respect to how this witness should be treated. This witness made it very clear to the world that he did not want to participate in this case in the context of quote an expert witness.

I ruled that he could offer his opinion as a treating physician. He's not gone through the same regimen of extensive depositions as have the other experts who will be called to testify in this case. He's here as a treating physician, and I've ruled that he may offer his opinion as to the cause of death. And he has just done that.
MR. McLAUGHLIN: Thank you very much, your Honor.
Q Now, there came a time after the passing of Mr. Tompkin when you had the occasion to meet with Mr. Smith and Mr. Netzley, is that correct?
A Yes.
Q And my understanding is when they came to see you, they asked you what caused Mr. Tompkin's lung cancer and you indicated that it was in part due to his use of tobacco, principally cigarette smoking; is that correct?
A Yes.
Q All right. But counsel did not ask you at that time

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whether there were any other potential causes of Mr. Tompkin's lung cancer, is that true?
A It's difficult to say because I don't have a photographic memory of that conversation. There were some general principles that when I have these encounters that I follow, but I can't categorically say that, no.

Q Okay. Well, you recognize that there are other possible causes of lung cancer besides cigarette smoking, correct?
A Yes.
Q And in fact, you considered Mr. Tompkin's history of asbestos exposure as a possible cause of his lung cancer, didn't you?
A Yes. I told counsel, plaintiff counsel that that could be a contributing factor.
Q And you held that opinion, Dr. Haas, up until the time you received a copy of Mr. Tompkin's autopsy report in this case, is that correct?
A Yes.
Q I think you received a copy of that autopsy report from Mr. Smith?
A Correct.
Q I take it you did not ask that an autopsy be performed?
A No, I did not ask an autopsy be performed.
Q For your purposes, sir, was it necessary to perform an autopsy on Mr. Tompkin?
A No, not for clinical purposes.
Q Now then, and again just to obviously state the obvious. Since you had an autopsy report, this was -- your care and treatment of Mr. Tompkin had long since ended,

right?
A Yes. Correct.
Q Mr. Tompkin had already passed?
A Yes.
Q Now, and upon your review of that autopsy report you then dismissed the possibility of asbestos causing lung cancer in David Tompkin, correct?
A Correct.
Q And you made that decision because the autopsy report you were provided did not find any asbestos fibers, correct?
A Correct.
Q In fact, according to the autopsy report you read, there were no, there was no pathologic evidence of asbestos?
A Correct.
Q In David Tompkin, okay.
Now, when you took -- did you take a history from Mr. Tompkin when you began your treatment?
A Yes.
Q Did he report to you at that time that he had been exposed to asbestos during his career as a bricklayer?
A Yes.
Q Okay. Well, so then, doctor, in order for you to arrive at your opinion that Mr. Tompkin's lung cancer was caused by cigarette smoking, you consider two things: Number 1, that he had lung cancer; and number two, that he

had been a cigarette smoker, right?

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A Correct.
Q Okay. Now, as a practicing oncologist, sir, in searching for a causal relationship you want to know both the intensity and duration of smoking, is that a fair statement?
A Correct.
Q And you like to talk in terms of pack years, pack year history of smoking, is that correct?
A Correct.
Q And that would be fairly standard among medical oncologists to speak, I think, in terms of pack year histories?
A Correct.
Q Now, with respect to pack year history, if you see a patient with less than a 20 pack year smoking history, you begin to look for causes of that lung cancer other than smoking, don't you?
A It raises my index of suspension, yes.
Q In fact, at the time I think your deposition was taken, Dr. Haas, back in December of 1997, you testified that you had an original note in your file indicating that Mr. Tompkin had a 30 pack year history of smoking?
A Correct. It's still there.
Q Thank you, sir, indeed.

Now, you would agree that if the facts were such that David Tompkin's smoking history was less than a 20 pack year, your opinion regarding causation in this case would be modified, right, doctor?
A There is the potential for modification, yes.
Q Now, isn't it a fact, Dr. Haas, that most of your patients have a heavy pack year consumption of cigarette smoking?
A Yes.
Q Okay. And indeed, some of the patients that you treat have a pack year smoking history of anywhere from 40 to 100 pack years, is that correct, sir?
A Correct.
Q Okay. And I believe that if you have a patient with a 40 pack year history or more, you would classify that patient as a heavy smoker, is that right, sir?
A I'm not sure there is exact terminology in terms of what constitutes light, moderate or heavy. I know that certain articles classify that, but yes, 40 pack years would be a significant consumption of tobacco.
Q Well, certainly anywhere from 40 to a hundred would be considered heavy, would it not, Dr. Haas?
A Yes, yes.
Q And in fact, doctor, most of your current patients who smoke actually present with lung cancer with a history of 40

pack years or more of smoking, is that right, sir?
A I'm not sure I would make that as a categorical statement. I do see patients with less. Sometimes patients, in terms of pack year history, not everybody smokes a pack of cigarettes a day.
You can get -- maybe for the jury a pack year constitutes an individual that smokes a pack of cigarettes a day for a year. Twenty pack years would then be an individual that smokes for 20 years of that intensity. But you can get to a 20 pack year history by smoking a half a

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pack of cigarettes for 40 years. So it is very important, at least when I see patients I find out when they initially began their tobacco use, and more importantly when was the last time they had a cigarette. Because that gives you a handle on what their actual duration is.

So to answer your question specifically, I would say now, I'm seeing more and more patients that have had lesser pack year histories. I think it is more of a question of the intensity over a longer duration, so.

Q Okay. And the importance of it is intensity is what, sir?

A Well, as I said, in terms of the risks, there are some, as I said, individuals that smoke less but then you have longer durations. And so now I'm seeing patients, especially elderly patients, that don't have the one pack,

two pack per day cigarette consumption but they still are a minority of patients.

Q And these elderly patients tend to be patients who have smoked for a number of years?

A Yes. As I said, maybe lesser amounts, maybe half a pack of cigarettes for 40 years.

Q I take it, sir, you advise your patients who smoke cigarettes to quit?

A Immediately.

Q You recognize that there are significant health benefits to quitting smoking, is that a fact, sir?

A Correct.

Q Now among the various risk factors for lung cancer you consider such factors as asbestos?

A Asbestos is a risk, yes.

Q Radon?

A Radon, again, is a risk.

Q Uranium?

A Uranium is a risk.

Q And other types of clinical exposure to occupational factors, is that right, sir?

A Right. But I think for the -- the jury needs to understand, as a practicing clinician, the significance of these exposures in terms of the overall clinical instance of lung cancer is problematic.

Tobacco clearly outweighs any of these other risk factors in terms of potential etiology for lung cancer as a practicing clinician, which I am.

Q Thank you, sir.

I take it, Dr. Haas, you could not at this time relate to the ladies and gentlemen of the jury with precision Mr. Tompkin's smoking history. By that I mean, when he started, when he stopped, what brands he smoked, when he smoked those brands, and what have you?

A All I have is, I received a stenographic copy of a video deposition which I guess apparently the jury has just seen.

Q And they have indeed seen that?

A All right. So that provided more detail, in terms of duration and intensity.

Q Well, then, sir, can you thing think of anyone in a better position than Mr. Tompkin to give his smoking history?

A No. There isn't. But again, you have to filter

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information which patients give you, patients for obvious reasons, we are all human beings, tend to minimize certain types of behavior. And so as a physician, practicing physician, you have to basically listen to your patients very closely and always understand that this may not be an exact history that you are getting.

Q I appreciate that doctor. But can you think of anyone, any person in a better position to relate his history of smoking than Mr. Tompkin?
A In his particular incidence probably not. Sometimes when I take history spouses tend to be a little more accurate in terms of these types of things.
Q Well did that happen here, sir?
A I don't know.
Q Now, doctor, since the jury must pass judgment on medical causation, wouldn't you agree that the jury should be presented with all the relevant facts?
A Yes, of course.
Q And you wouldn't want the jury deciding medical causation with only some of the facts or with -- or on the basis of inaccurate facts or information, is that a fair statement?
A Correct.
Q And would you agree, sir, that the reliability of any medical causation opinion presented to the jury must be measured by the quality of the factual information or assumptions underlying that opinion, is that correct?
A Yes, that's a fair statement.
Q Now, and the primary factual assumptions, Dr. Haas, which serve as the basis, or I guess the foundation, if you will, for your medical causation opinion in this case are:

One, the lack of any pathologic evidence of asbestos fibers in Mr. Tompkin's lungs, correct?
A That was one of the bases of assumption, yes.
Q And two, that David Tompkin had a pack year smoking history of approximately 30 pack years, is that correct, is that correct?
A I would say, I think it's important.
Q Doctor, answer my question?
THE COURT: Wait a minute, he's starting to answer the question. Let him answer the question.
THE WITNESS: Thank you. I think it's important -- well, as an oncologist, we are taught there is no threshold value in terms of cigarette smoking and the risk of lung cancer. So the construct of a 20 pack year history is, to a certain degree, art factual. It assists us in determining risks and causation, but it is not absolute.
Q Well let me go back.
A And so I would say, at least as a practicing clinician, there is no threshold value at which below a patient is not going to be at risk of lung cancer from smoking and above then he will be or she will be.
Q Doctor, but your primary factual assumptions which lead you in this case, not just in general but in the case of David Tompkin, leads you to the opinion you have given

here today in front of this jury, are two:

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One, the lack of asbestos findings on pathology, correct, sir?
A Correct.
Q And your testimony that David Tompkin, according to the note in your file, had a pack year smoking history of 30, is that correct, sir?
A Again, I don't want to get fixated on 30, but yes, he had sufficient pack year history to me, in terms of the history, that he had risk of lung cancer from cigarette smoking.
Q And which you understand to be 30, is that correct?
A That was what the initial history was given to me.
Q And your opinion, as you have presented it here, relies upon the correctness of both of these factual assumptions, isn't that correct, Dr. Haas?
A Not necessarily. I mean there could be other mitigating factors, and I gave that in my deposition four years ago.
Q Doctor, the opinion, as you represented it here in front of the ladies and gentlemen of this jury, relies on both of those two primary factual assumptions, is that correct or not correct?
A Correct. But there is more to it. It is not that simple.

MR. McLAUGHLIN: Dr. Haas, thank you very much for coming in, sir.
THE WITNESS: Thank you.
THE COURT: Anything else from defendants? Redirect.

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REDIRECT EXAMINATION

BY MR. SMITH:
Q Dr. Haas, would your opinion as to the cause of David Tompkin's lung cancer change if the pack years were 15 to 17?
A No.
Q Would they change if he had any asbestos burden in his tissue?
A No.
MR. SMITH: That's all I have, thank you.

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RECROSS EXAMINATION

BY MR. McLAUGHLIN:
Q Let me make sure I understand your testimony, Dr. Haas. It's irrelevant to you, sir, whether or not Mr. Tompkin did in fact have asbestos fibers in his lungs?
A No, it is very relevant.
Q It would be relevant to you?
A Very much so.

Q Your understanding is that he did not, is that correct, sir?
A I can only deal with the information I was given.
Q Thank you, sir.
THE COURT: You may step down. Thank you.
THE WITNESS: Thank you, judge.
THE COURT: Please call your next witness.
MR. SMITH: Dr. Netzley, your Honor.
THE COURT: Please come forward. Kind of like walk the gauntlet.

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Come over here, please. Please raise your right hand.

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ROBERT G. NETZLEY

called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Good morning, sir?

A Good morning.

Q Would you state your name, please?

A Robert G. Netzley.

Q And your occupation, please?

A I'm a cardiothoracic and vascular surgeon.

Q Do you want to pull that mike maybe a hair closer to you.

A I'll get closer to it. How's that?

Q Thank you very much.

And Dr. Netzley, would you tell the ladies and gentlemen of the jury, please, and his Honor Judge Dowd the office where you practice, its address?

A It's at 224 West Exchange Street, Suite 300. Adjacent to Akron General.

Q And that's here in Akron, Ohio?

A Correct.

Q Would you please tell us where you went to school, your professional schooling, sir?

A I went to medical school at Northeastern Ohio University's College of Medicine. I followed that up with a general surgery residency at Akron General. I did a peripheral vascular fellowship in Columbus, Ohio at St. Anthony's. And I did myocardial thoracic fellowship at Madison, Wisconsin.

Q You are licensed to practice medicine in the State of Ohio at this time?

A Yes.

Q And are you Board Certified?

A Yes.

Q And your Board certification is in what, sir?

A Initially I certified in general surgery and then in thoracic surgery.

Q And what is thoracic surgery?

A Thoracic surgery primarily deals with operative treatment of diseases in the chest, cardiac disease, heart disease, diseases of the lung, surgical diseases of the lung and esophagus.

Q Was David Tompkin a patient of yours, sir?

A Yes.

Q And approximately when did you see him, please?

A I believe it was in the late August or early September, 1992.

Q And it was where, please?

A I initially saw him in my office.

Q And then what happened?

A He was sent to me for evaluation for surgery. Although it appeared that he needed some additional therapy prior to really being a very good candidate for an operation.

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Q And would you tell us about that? What does that mean?
A He was sent to my office by, I believe, either one of the radiation oncologists or medical oncologists with the information that he had had a biopsy done at, I believe, Cuyahoga Falls, that indicated that he had a lung cancer.

And this lung cancer was really biopsied from the lymph nodes or trachea of his windpipe. That makes it a cancer that is not normally not treated up front or initially with an operation.

I made him aware of this. He understood and we sort of agreed that we would try and treat him with some other nonsurgical means first, chemotherapy and/or radiation, and if he responded to those he would come back and have an operation that would hopefully clean out any remaining tumor in his chest.

Q And that's what you did in this case?
A Correct.
Q And what decision was then made with respect to the surgery?
A We weren't really absolutely positive that we would be able to remove all the tumor, and we proceeded sort of in a staged fashion, all at one time, evaluating him for a tumor that still might be hiding inside the airways of his lung, as well as whether or not he had signs of tumor that still might be active and invading the chest inside. In other words, growing out of the lung and growing on to the inner side of his ribs.

We did that with a sort of a minimally evasive approach, going between the ribs, and doing biopsies in the operating room to see if there was actually living, viable

or aggressive tumor in those areas.

We couldn't really document that at the time of surgery, so we went ahead with a larger operation again. At the same time, same setting we removed the upper lobe of his right lung, in an attempt to take out all the tumor, as well as harvest a lot of the lymph nodes inside the chest to determine whether the tumor had spread to other lymph nodes.

Q That would have happened at Akron General Hospital?
A Yes.
Q Approximately when was that?
A I believe that was the 21ststst of September.
Q 1992?
A Correct.
Q And what happened next?
A He had a relatively uneventful recovery in the hospital. He had a few temperature spikes and things like that, which aren't unusual at all for this kind of operation. Went through the process of getting pretty good pain control. Some of the drain tubes that we put in around the lung were able to be removed in a reasonably timely fashion, and he went home.
Q Did you have occasion to see him again?
A Yes.
Q And tell us how he went?

A He was seen back in our office several times, more of

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a routine post op where some of the sutures or staples had to be removed.

In an individual such as this we've got a couple of interested physicians who would want to follow him up, and he didn't need a lot of post op surgical care outside of getting him to the point where we were convinced that his wounds were healing nicely and they wouldn't give him any major problems. He was being seen by the medical oncology group as well as radiation oncology, so we followed him, I think, for a couple months until we were satisfied that his incisions and wounds were healed up and he was getting some of his normal activities back from the surgical recovery and told him to come and see us if he needed us after that.

Q I learned, I think it was in your record, that David made something for you, is that correct?

A Yes.

Q Do you have that with you today, please?

A I do. I'd been in practice about 2 or 3 -- I started in 1989 and it wasn't very common that a patient came in, particularly after all the things that you put someone like that through, and made a present to you after surgery.

And David came in one of the last visits and gave me this little box that he made at home, sort as of as

he was recovering trying to get back up to speed.

MR. SMITH: Thank you. That's all I have, sir.

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CROSS EXAMINATION

BY MR. SUFFERN:

Q Good morning.

Dr. Netzley, my name is Michael Suffern, I represent the American Tobacco Company in this case. I have just a few questions for you, sir.

You told Mr. Smith that when you were doing your surgery on Mr. Tompkin you checked to see if some of the tumor might have invaded his actual airways, is that correct?

A Yes. We do that pretty routinely on any lung operation for the reason that the scanning kind of x-rays that we do sometimes will not pick up very small tumors that might be in a part of the lung that we would otherwise be leaving behind.

Q And in this case, doctor, you found no evidence that there was in fact any tumor in Mr. Tompkin's bronchi, isn't that true?

A None of the areas that we looked at showed us any obvious problems in the airways that we were planning on leaving in the chest.

Q Dr. Netzley, with the court's permission, I would like

to ask you a couple questions about this document. It has been marked by plaintiff's counsel as Tompkin Exhibit 3.002.

MR. SUFFERN: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. SUFFERN:

Q Dr. Netzley, I'm handing you what has been marked as Tompkin Exhibit 3.002 for identification, and I would like to ask you to tell the jury, sir, if that is not a portion of your chart in Mr. Tompkin's case?

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A This is a part of the chart from my office, I believe.
MR. SUFFERN: Your Honor, may I publish to the jury? I have a blow up of the page.
THE COURT: Any objection?
MR. SMITH: No, your Honor.
MR. SUFFERN: Thank you.
THE COURT: You may.
BY MR. SUFFERN:
Q Now Dr. Netzley, I'm going to put this up here so the jury can see it. But while I'm doing that, would you please just tell the jury, in general, what is your chart, what is a chart?
THE COURT: You want to cock it so we can all see it.
BY MR. SUFFERN:

Q Can you see it?
A Yes. A patient like this has several different charts. As I talk about that one being the things that we did and recorded in the hospital, and then different, separate issues, what happens in terms of our interaction with him in the office. This is a, this is part of the record that I dictated on his office visits after surgery.
Q In fact, the chart for one of your patients, Mr. Tompkin or any patient, its a very important document for your care and treatment of your patients, isn't it?
A Yes.
Q You need to rely upon the information that appears in your charts, isn't that fair?
A Sure.
Q This particular portion of your chart, and I know it is just an excerpt, it appears to chronicle three office visits from Mr. Tompkin, is that correct?
A I think he had two office visits, according to this. I think there are other parts of the chart, but this only documents February 9th, 1993 and August 31, 1993.
Q I notice that the handwritten portion at the bottom appears to be different. As you point out, it doesn't have a specific date. But would it be fair to say it appears to be in the month of December of 1993?
A It says month of December, I don't see a date on that.

And it would be a guess as to exactly when that was entered, but.
Q In any event, this handwritten -- is it, is this, you say, two office visits. Might Mr. Tompkin have called your office, and is that a notation about a telephone call he made to your office?
A That would be my guess, that the handwritten was a guess about a phone call that he may have made.
Q And would you please read to the jury and to his Honor Judge Dowd the handwritten portion of your chart there, doctor?
A Month of December, patient inquired as to possible cause of carcinoma. There is a question mark, exposure to asbestos at workplace. RGN stated pathology.
Q Might it be report?
A Might be. States findings.
Q So Mr. Tompkin called and was asking you, questioning whether his exposure to asbestos in the workplace may have been a cause of his carcinoma, is that fair?

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A That's what the chart records. I don't believe he spoke with me, but that would certainly be my impression from that.
Q Thank you, doctor. That's all I have, thanks.
THE COURT: Anything, any redirect?
MR. SMITH: No, your Honor.

THE COURT: You may step down, doctor. Thank you.
Do you have another witness ready at this point?
MR. NACE: Yes, your Honor. The plaintiff calls Joseph Livigni.
THE COURT: I didn't get the name.
MR. SMITH: Joseph Livigni, L-I-V-I-G-N-I.

JOSEPH LIVIGNI

called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NACE:
Q Would you state your name for the record, sir?
A Joseph Livigni.
Q And where do you live?
A [DELETED]
Q Did you know David Tompkin?
A Since 1953.
Q And where did you meet him?
A Apprentice school, we were bricklayer apprentices in the year '53.
Q From 1953.
Did you work with him after that date?

A Well, we worked for four years straight and we worked a little later. We met again with Brown and then he come to work for me about 15 years, and we were in business for about 15 years, so I've known him quite a while.
Q You went into business together?
A Yes.
Q When was that?
A I'm going to guess somewhere around '85. I'm going to be a year or two short, but it's going to be somewhere around '85.
Q And this was a bricklaying business?
A Yes, masonry.
Q What was the name of business?
A D & J Masonry. Dave and Joe.
Q And so you had occasion over all these years to see Mr. Tompkin's work?
A Oh, yeah, I hope to tell you, yeah, we worked together all the time.
Q Was he a good mason?
A Excellent.
Q Was he one of the best you have ever seen?
A Twice as good as I ever was, and I thought I was good.
Q And did he take pride in his work?
A Yeah, he did. That he did.
Q Did you ever know Mr. Tompkin to have a problem with

drinking?

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A No, sir, had a few drinks, but no, no problem I know of.
Q Did he ever, did alcohol ever affect his work on a job?
A No. No, he didn't hardly ever drink on the job. He never drank really on the job.
Q Could you tell us whether during any of that time period Mr. Tompkin ever smoked cigarettes?
A When we were apprentice boys all of us smoked quite a bit, and I think he smoked when I worked for Brown a little bit. And he quit, just gave them up one day and said he was not smoking no more.
Q So you were in business together?
A No, no, Lord no, he quit long before that.
Q And you happen to remember any of the brands that Mr. Tompkin smoked?
A Probably Pall Mall, but the one I remember most was that stupid Lark. I couldn't smoke that; Tareyton or Lark. Was charcoal, I bummed a cigarette from him. I couldn't smoke it. I just throwed it away. But I remember that one well.
MR. NACE: Thank you, sir. That's all I have.

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CROSS EXAMINATION

BY MS. CHAPMAN:
Q Good morning Mr. Livigni.
My name is Diane Chapman and I am one of the attorneys for Philip Morris in this case. And we've met on several occasions before. You may have remembered the lawyers came to your home and interviewed you and there was a deposition. These surroundings are a little different from your home. It's nice to see you again, sir.
Mr. Livigni, you have been a friend of Mr. Tompkin -- were a friend of his since about 1953, is that correct?
A That's correct.
Q And during the time that you worked with him when you both worked for other companies, or when the two of you ran your own company, you had an opportunity to observe certain personality traits about Mr. Tompkin, is that correct?
A Yes.
Q He was a very independent, stubborn gentleman is that correct?
A Well, let's say he was what we call bull headed. I won't say he was stubborn, he was a little bull headed. He had the right way to do it, and that's the way he wanted to do it.
Q When he made up his mind to do something a certain way, 99 percent of the time --

A I said probably at least 99 percent of the time, yes, I would give up on an argument. He general won.
Q He was also a person who was interested in educational things. You told me he liked to watch the Discovery Channel?
A Yes, he did.
Q He read magazines and articles. He was interested in what was going on in the world, is that correct?
A Absolutely.
Q And when he made up his mind to quit drinking, next

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day that was it, he put it away and quit drinking.
A That's the way I remember it.
Q Now, during the time that the workers were on the site and other things, you often heard the term cancer sticks and coffin nails, is that correct?
A When you say cancer sticks, that was later on. But at the beginning they said there is a nail in my coffin, they hacked and coughed; the old timers said you could chew tobacco or smoke. As far as saying it was cancer at the time in '50' and '60's, I can't say that.
Q But coffin nail is a term you are familiar with?
A Coffin nail, yes.
Q All the guys who smoked at the time would use that expression?
A Quite a few of them.

Q And you heard Mr. Tompkin say that when he would smoke?
A Not for himself. Someone asked me that. One time he said as far as, you know, you are going to put a nail in your coffin. He said that to a lot of people but not himself, as far as I know, because he had quit.
I got to tell you, he quit for a long time.
Q So are you telling me you would hear other people using coffin nails when Mr. Tompkin was smoking?
A No, not for Mr. Tompkin. I can't tell you for sure because we are going through a lot of years here.
Q It is hard to remember back 35 or 40 years?
A I think it is. I do remember the man, but there is a lot of statements I can't say was right or wrong.
Q But in general, around the workers when they were smoking, coffin nails is something was used fairly often?
A Right, people used that.
MS. CHAPMAN: Thank you Mr. Livigni.
MR. SUFFERN: Less that five minutes.

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CROSS EXAMINATION

BY MR. SUFFERN:
Q Mr. Livigni, my name is Mike Suffern. I just have a couple questions about your job.
Bricklaying is hard work, isn't it?

A Yes, it is.
Q And when you are out there sawing brick you get a lot of brick dust that flies up into your face and you breathe it into your lungs, is that correct? Is that right?
A That's a question there. I was one that didn't use a mask, but Dave was known to use a mask quite often.
Q Dave would use a mask?
A Yes.
Q This was throughout the 1950s and early '60s?
A No, not in the '50s.
Q Because in the '50s nobody wore a mask?
A I couldn't say that, no.
Q And it was a different world in the 1950s and people didn't wear respiratory protection?
A We didn't use, a person -- one person would use a saw. We had a saw man and he did most of the sawing. I did very little of the sawing for 20 years.
Q But my question is, sir, in the 1950s and early 1960s we didn't live in a culture where people who were going out

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to work for a living and cut brick would put masks on their face, did we?
A No, we didn't know any better, I don't think.
MR. SUFFERN: Thank you, sir.
THE COURT: Anything further, any redirect.
MR. NACE: No, your Honor.

THE COURT: Thank you, you may step down.
We'll take the noon recess. We'll resume at 1:00 o'clock. You may file out.
(Luncheon recess.)

AFTERNOON SESSION
(Jury in).
THE COURT: Please be seated.
Please call your next witness.
MR. SMITH: Yes, sir. Dr. Tomashefski, please.
JOSEPH TOMASHEFSKI,
of lawful age, a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:
DIRECT EXAMINATION OF JOSEPH TOMASHEFSKI
BY MR. SMITH:
Q. Okay. Would you state your name, please, sir?
A. Joseph Francis Tomashefski, Jr.
Q. Your occupation, please?
A. I am a physician.
THE COURT: Would you spell your last name, please?
THE WITNESS: Capital T-O-M-A-S-H-E-F-S-K-I.
THE COURT: Thank you, Doctor.
Q. Dr. Tomashefski, where do you practice your profession, please?
A. At Metro Health Medical Center in Cleveland, Ohio.
Q. And your profession is what, sir?
A. I'm a pathologist.

Q. Could you please tell us what a pathologist is?
A. A pathologist is a physician who practices the

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specialty of pathology, which really is defined as the study of disease.

We also are in charge of what is called laboratory medicine, and our role is to diagnose diseases using various laboratory methods.

Q. And where do you practice your profession, please?

A. Again I practice at Metro Health Medical Center in Cleveland, Ohio.

Q. Thank you. Would you tell us of your schooling, Dr. Tomashefski?

A. I did my undergraduate schooling at University of Notre Dame. I graduated in 1972.

Then I came to Case Western Reserve University where I did my medical school training, graduating in 1976.

I then went right into pathology training as a resident at the Institute of Pathology at Case Western Reserve University, and studied both anatomic and clinical pathology. That was a four-year program.

Following that, I did two years of specialty training in lung pathology, also called pulmonary pathology, in Boston; one year at the New England Deaconess hospital and one year at Boston Children's hospital.

Q. You are licensed to practice medicine in the State of Ohio?

A. Yes, I am.

Q. Do you have board certifications, Dr. Tomashefski?

A. Yes, I am board certified in both anatomic and clinical pathology.

Q. Would you briefly tell us the difference between those two?

A. Certainly.

Anatomic pathology is that portion of pathology where diagnoses are made based on evaluation of tissue or cells removed from the body, usually using some type of magnification or microscopic methods.

Anatomic pathology includes surgical pathology, where we diagnose tissues removed from the body at surgery. It also includes autopsy pathology which is the performance of post-mortem examinations. It also includes the specialty of cytology, the examination of cells in body fluids.

As opposed to anatomic pathology, clinical pathology is the portion of pathology which is involved in the more or less chemical evaluation of body fluids, usually using high tech instrumentation rather than direct visualization.

And here we are talking about clinical

chemistry, microbiology, immunology, hematology, looking at the blood components and evaluating them.

This is usually a -- done in a laboratory with advanced technological instruments, looking at thousands of specimens a day.

Q. Did you have any honors while you were in school, by the way, Notre Dame?

A. I graduated summa cum laude, and also was enrolled in Phi Beta Kappa.

Q. Do you belong to various medical societies?

A. Yes, I do.

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Q. And would you tell us some of them, please?
A. I'm a member of the American Thoracic Society.
Q. What is thoracic, please?
A. By thoracic is -- that's the society in this country involved with physicians who deal with diseases of the chest, mainly the lungs.
The American Thoracic Society, also the Ohio Thoracic Society and I'm the past president of that organization.
I'm a member of the Cleveland Society of Pathologists and also past president of the Cleveland Society of Pathology.
I am a member of the Ohio Society of Pathologists, the International Academy of Pathologists and

several other societies.
Q. You have been very active in societies involving your profession, I take it?
A. Yes, I have.
Q. After you completed your fellowship at the department of pathology at Boston Children's hospital in Boston, Massachusetts, what did you then do?
A. I returned to Cleveland and took a position in the department of pathology at Metro Health Medical Center -- at that time it was Cleveland Metropolitan General Hospital -- as a staff pathologist.
Q. And have you been there ever since?
A. I've been there ever since, yes. In fact, this is my twentieth year.
Q. Would you tell us what you have done at Metro General; how your work has changed over time, please?
A. Over time, I've taken on increasing responsibility. I moved from a staff pathologist to head of the autopsy service for a few years.
Then I became head of surgical pathology. And upon the retirement of our former department chairperson, I became the chairperson of pathology about two or three years ago.
Q. Do you also teach?
A. Yes, I'm heavily involved in teaching at Case Western

Reserve University school of medicine.
We also have our own residency program in the department of pathology where we teach young physicians how to become pathologists, and I have an academic appointment at Case Western Reserve University as professor of pathology.
Q. What do you do there, please?
A. My involvement is mainly in teaching the medical students pathology. I am head of the pathology teaching for the second-year medical students, and I also personally and am in charge of the teaching of pulmonary pathology, of our pathology of the lung, to the second-year medical students.
Q. Are there people who become experts at reading x-rays that are known as B readers?
A. Well, in general, experts at reading x-rays are called radiologists, and there is a certain group of radiologists that we call B readers.
B readers --
Q. What does that mean, please?

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A. Well, B readers are those individuals who have been trained by taking a rather rigorous course put on by the American College of Radiology, and passing a rigorous exam in the interpretation of x-rays specifically related to occupational lung diseases.

And one who has passed this exam is qualified to then review and grade x-rays having to do with occupational lung disease. And these individuals are called B readers.

Q. And one of the occupational diseases that they look at, is it -- does it involve asbestos?

A. Well, it can really involve many occupational diseases.

Q. Yes, sir.

A. And diseases due to asbestos is one of the occupational diseases that B readers learn to interpret.

Q. Have you been involved with teaching those that are trying or attempting to become B readers?

A. Yes. For about six years now, I have been the pathologist who gives a lecture at the American College of Radiology B reading course on the pathology of asbestos-related lung disease.

And this is a lecture given to the attendees of the course who are then going to go on and take the exam and be certified as B readers.

So, yes, I have been involved in that, mainly on giving the lectures on the pathology of asbestos-related lung disease.

Q. And you are going to teach there again in the near future, as I understand it?

A. In fact in about three weeks I'm going to be going to the Washington, D.C. area to lecture at the course on asbestos-related lung disease and also lung disease due to coal and silica.

Q. Can you tell us whether or not you lecture on topics including asbestos at Case Western Reserve?

A. Yes, I give the lecture to the second-year medical students on occupational lung disease, and that includes a lecture on asbestos-related lung disease.

Q. Dr. Tomashefski, did you -- I want to say have the misfortune in a sense because an autopsy is always a misfortune.

But were you involved with the autopsy of David Tompkin?

A. Yes, I was. I was directly involved in that; supervised and signed the report related to Mr. Tompkin's autopsy.

Q. And that autopsy took place where, sir?

A. It took place in the autopsy room at Metro Health Medical Center.

Q. And would you tell us, please, what was done in the overall picture involving that?

A. Well, the autopsy, of course, involves making incisions in the body, removing and examining all the organs, making microscopic slides from those organs and

examining them with the microscope.

But more than that, it also involved

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reviewing the medical records in Mr. Tompkin's case. It also, excuse me, involved reviewing slides that were made from biopsies taken from Mr. Tompkin while he was alive.
Q. Would you like a glass of water?
A. Yeah, I'll get it right here.
So in other words, in addition to the autopsy itself, there was a review of medical records, there was a review of biopsies taken from Mr. Tompkin while he was alive. There was also some special studies that were made of the tissue that was collected at the autopsy.
And this was all assimilated into an autopsy report.
Q. Would you tell us what it means to review slides?
A. Well, this gets back to the definition of anatomic pathology.
The slides, as in case you are not aware, are thin sections of tissue which are mounted on glass. And they are specially stained with different types of tinctorial stains so that the pathologist can see the tissue under the microscope.
And these are then reviewed with what we call a light microscope which can magnify up to a thousand times.

It's very important that the tissue be prepared, cut into thin sections, stained and then reviewed under the microscope in order to evaluate these slides.
Q. And the slides from what portions of David Tompkin's body were primarily reviewed in this case?
A. Well, in fact, in doing a complete autopsy, we reviewed slides from basically all of the organs of his body. We focused on those organs in which there was the most disease.
Q. And that would have been which area?
A. Predominantly in the chest cavity, mainly in the lungs and an area of the chest that we call the media mediastinum.
Q. Have any tests been done involving tissues with respect to focusing on whether there are any tissue burdens of any type in this matter?
A. Yes, we evaluated the tissue from Mr. Tompkin's lungs, specifically looking for asbestos, and the reason why we were looking for asbestos is because it was known from the medical records that Mr. Tompkin had claimed to have been exposed to asbestos.
We determined from the autopsy that he had developed lung cancer, and we tried to identify whether asbestos was present which may have contributed to his lung cancer.

And we did that in several ways. First, we stained the slides specially to identify structures that we call asbestos bodies. These are iron-containing structures that can only be seen microscopically that we can look at in the tissue slides to give us a clue that asbestos is present.
We did not find any such bodies.
And then we took the evaluation to the next level. We sent the tissue off to have the tissue actually digested and evaluated for the amount of asbestos fibers in the lung.

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Q. If we could go back a minute, between those first two steps.

Your initial belief was that asbestos was involved with Mr. Tompkin's lung cancer or it was not involved, originally?

A. Initially, when we had the negative stains for the asbestos bodies, the interpretation was that probably this was not an asbestos-related case.

Q. In any of the material that you received from any of the -- his prior medical records, was there any indication that he suffered from asbestosis or anything of that nature?

A. Well, I should probably define what asbestosis is.

Q. Yes, sir. Yes, sir.

A. Asbestosis is a condition of the lung caused by inhalation of asbestos fibers.

And I should probably explain what an asbestos fiber is as well.

Q. I -- and with the Court's permission, if at any time you think it would help to draw on the easel, as long as it's permitted by the Court, please do so if you think it would assist you.

THE COURT: Fine. Go ahead.

A. Let me first define, since we are talking about asbestos --

Q. Yes, sir.

A. -- I think to set the ground rules, what asbestos is.

I've already identified it as a fibrous mineral that is ubiquitous in the society. The problem with asbestos is that it's quite injurious to the lung and it can cause a variety of diseases.

And asbestos is really a very thin filament which is practically invisible by the light microscope. We can't see it in tissue.

The only way we know it's there is if we do these special stains, and identify the lung's reaction to the fiber.

That's why sometimes we have to go and do further elaborate studies in digesting the lung and

concentrating these fibers and using special techniques to examine the fiber burden.

But I think I could now explain --

Q. I would appreciate it.

A. I'll try to define a number of the terms that I'm using.

THE COURT: Can we get him the mike here?

MR. SMITH: Yes. Here.

MR. McLAUGHLIN: It's right there.

THE COURT: And turn it on.

MR. SMITH: Yes, sir.

Your Honor, is this --

THE COURT: Go ahead. Go ahead. Just the main thing is I want the jury to be able to see it.

THE WITNESS: I think I should stand --

A. Hopefully if I do my job here in defining some of these things I've been talking about, it will set the ground rules so you'll have a better understanding of the discussion that's going to ensue.

MR. McLAUGHLIN: Excuse me.

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A. First I want to draw a rough schematic of the organs of the thorax. And please forgive my primitive art work.

(Pause).

THE COURT: Can you see it?

MR. COFER: Yes, sir. Thank you, Your Honor.

(Pause).

A. (Drawing). Now, in case you couldn't guess, this is the heart and the lungs, the organs of the thorax.

Basically the lungs are the organs of respiration. They serve the important role of oxygenating the blood and delivering oxygen to the blood so that it can provide nutrients to the entire body.

The lungs are the only source of oxygenation. They work in concert with the heart, which is located in between the right and the left lung.

The air which is delivered to the lung reaches the lung by a series of tubes. Starting at the mouth we have a -- the windpipe or the trachea, which reaches a point and then branches into what we call bronchi. These are large tubes that deliver the air to the lung.

The bronchi then branch into the substance of the lung, divide, become increasingly smaller tubes that we call bronchials, until they finally end in what we call the parenchyma of the lung or the alveolar region of the lung which is the area where gas exchange takes place.

These are small sacs which contain air and transmit oxygen across the capillary bed and remove carbon dioxide. The carbon dioxide is then exhaled with each exhalation.

Now, the air gets into the lungs by the motion of a very important muscle which separates the thorax from the abdomen, and this is called the diaphragm. And when the diaphragm contracts, it causes -- it decreases the pressure in the thorax which draws air into the lungs.

The lungs themselves are coated by a membrane, it's a very thin membrane, but an important one that we call the pleura. And the pleura is actually a double membrane. It covers the surface of the lung. We call that the visceral pleura. And it also covers the inner surface of the chest wall. We call that the parietal pleura. And these two surfaces slide on each other to allow the lungs to expand easily.

Okay? So we have the parietal and visceral pleura.

This is the heart. The right side of the heart pumps deoxygenated blood to the lungs through the pulmonary artery. The blood returns to the left side of the heart, and then is pumped to the organs of the body through the aorta.

The mediastinum, the term I've already used, is this central portion in between the lungs that houses the trachea, the heart, the major bronchi and also importantly lymph nodes. And the lymph nodes are situated all along the trachea like this.

Now, when we talk about asbestos or later on we are going to talk about cigarette smoke, those agents

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also reach the lungs through this series of pipes and can be deposited into the lungs.

There are certain diseases that we associate with asbestos, and we've already touched on a couple of them.

I just want to list them for you, and show you what they are in relationship to this diagram.

The first is pleural plaques. Pleural plaques are small, firm elevations which occur out on the pleural surface. They can occur on the chest wall or on the diaphragm.

And one of the things we found in Mr. Tompkin was a pleural plaque on his diaphragm.

Pleural plaques ordinarily are a marker of asbestos exposure.

Another disease that asbestos can cause is a disease that we call asbestosis. Asbestosis is a disease in which the substance of the lung is converted by the injurious damage imparted by asbestos from a very thin, soft pillowy-type organ to a very hard fibrotic organ.

And when we talk about fibrosis, we are talking about scar tissue. And asbestosis is basically scarring of the lungs due to asbestos.

The third major category of this disease --

Q. Excuse me one second on that.

While you are at it, did you find any of that with David Tompkin?

A. No, I did not.

Q. All right.

A. The third disease that's associated with asbestos is lung cancer or more specifically carcinoma. Carcinoma is another term for a type of cancer.

Lung cancer represents a malignant or a lethal unregulated proliferation of cells within the lung that originate in the lung, produce what we call a tumor, and that tumor has the capacity to metastasize beyond its point of origin and kill the patient.

Asbestos usually causes lung cancer in patients who have very heavy asbestos exposures and who also smoke cigarettes.

And lung cancers occur in the substance of the lung.

The fourth type of disease is a disease that we call a mesothelioma. This is also a malignant tumor, but rather than being in the lung, it's a tumor that occurs out on the pleural surface and tends to encase the lung. But it is also a malignant lethal tumor.

So these are the basic diseases related to

asbestos exposure.

Q. And just for clarity, can you tell us whether or not David Tompkin had mesothelioma?

A. He did not have mesothelioma.

The last thing I wanted to do is just to go over a little bit --

THE COURT: Let's wait for a question now.

MR. SMITH: Yes, sir.

Q. The asbestos fibers, where do they lodge?

A. The asbestos fibers are inhaled, they lodge either in the lung parenchyma, they can lodge in the small airways,

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or they can penetrate the pleura.
Q. Then they wind up where?
A. Well, if they penetrate the pleura, they wind up out here, can cause mesothelioma.
If they lodge within the substance of the lung, they are -- they can cause lung cancer or asbestosis.
Q. And you mentioned tobacco smoke.
What does it do?
A. There are several diseases associated with tobacco smoke.
First, there's lung cancer. Secondly, there's what we call chronic obstructive lung disease, namely --
Q. What does that mean?

A. It means a disease of the lung which limits air flow.
And the major diseases due to cigarette smoke in the lung are chronic bronchitis and emphysema.
And I'm just confining my comments here to the lung.
Q. Yes, sir.
The -- would you like to resume your seat or would this --
A. The only other thing I wanted to do was to illustrate where Mr. Tompkin's tumor was located.
Q. Yes, sir. Yes, sir. Please.
A. Mr. Tompkin had a lung cancer that was situated in his right upper lobe, near the trachea. So it would have been right in this area somewhere in the substance of his lung.
The tumor also spread and, in fact, was detected initially because it had metastasized to a peritracheal lymph node, and that would be a lymph node right around this area.
And at autopsy, we found metastases to other lymph nodes in the mediastinum, and also metastases to both lungs, as well as to the heart.
Q. Those occur in the later stage? I apologize.
Can you tell us whether or not those occur in the later stages of cancer?

A. The metastases occur in the later stages.
After the tumor has reached a certain size, it then spreads beyond its point of origin and it can go virtually anywhere in the body. In this case, in Mr. Tompkin's case, the spread was really confined to within the thorax.
Q. Thorax meaning?
A. The chest cavity. It involved the lungs, the heart, the pleura, and the lymph nodes in the mediastinum.
Q. Yes, sir. Thank you.
THE COURT: You might take that and cock it so I can see it as well as the jury, and the witness can take the stand again.
MR. SMITH: Yes, sir.
THE COURT: That's fine.
Q. Are there also tests known as P53 and K-Ras studies?
A. Well, these are really modern technologies that have come into play really within the last few years.
As our knowledge of cellular biology has expanded and our ability to manipulate and test for DNA and

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our understanding of the human genome has increased, we are now able to look for structures and aberrations at the genetic level.
Q. What does the word "genome" mean, please, Dr. Tomashefski?

A. The genome refers to the DNA component of the cell, that part that controls really the functions of the cell.
And the terms you mention, P53 --
Q. Yes, sir.
A. Was there another term you mentioned?
Q. K-Ras.
A. -- and K-Ras, these refer to substances that involve the genome that are particularly important in causing tumors.
P53 is what we call a tumor suppressor gene. It normally acts at the cellular level to decrease cell proliferation. And when it becomes mutated, that process then is impaired allowing cells to proliferate and to form a cancer.
The K-Ras, on the other hand, is a part of the gene that we call an oncogene, and it directly stimulates the development of cancer when it becomes mutated.
Q. Is that why it's -- is that what the word oncogene means or --
A. Basically, yes.
Q. So one of them is the good cop fighting the disease, and the other one is the bad cop, so to speak?
A. Well, the P53 would be the good cop until it's mutated and impaired, in which case it becomes the

criminal.
And the K-Ras is the bad actor right from the beginning.
Q. Would you tell us what the results of those tests were and their significance, please?
A. Well, first of all, we had Mr. Tompkin's tumor tissue, both some of the tissue that was saved from his initial biopsy from the tumor that had spread to his lymph nodes, and also from the tumor that was in his lung at autopsy.
We had that evaluated for P53 and K-Ras oncogene because studies have shown that cancers caused by cigarette smoking will often have the P53 mutations or the K-Ras oncogene mutations.
So we were trying to determine whether we could prove that Mr. Tompkin's lung cancer was caused by cigarette smoke, by looking for these oncogenes and suppressor genes.
Q. And were they tested?
A. Yes, they were.
We did one test in our laboratory at Metro Health Medical Center for P53, and it was negative. And we had sent some tissue off actually to the Netherlands to a laboratory where they evaluated it for K-Ras oncogene, and that also was negative.

Q. After all these tests were completed, did you arrive at an opinion -- I guess before I go to that level, let me

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make sure that we are clear on one thing.
Dr. Tomashefski, did you have and do you have an opinion as to the disease from which David Tompkin was suffering based upon the autopsy, the pathology, the review of records, and the tests that you've had done, including the P53, the K-Ras and the fiber burden studies?
Do you have an opinion as to the condition from which David Tompkin suffered?
A. Yes, I do.
Q. And what was that, please, and what is it?
A. It's my opinion, after evaluating all the records and performing Mr. Tompkin's autopsy and looking at all these special studies, that Mr. Tompkin had a primary cancer of his lung which originated in his right upper lobe. It is a type of cancer that we call adenocarcinoma.
That this cancer had spread beyond the lung to involve other parts of the lung on both sides, to involve his heart, to involve the lymph nodes in his mediastinum.
That this cancer had necessitated that his right upper lobe of his lung be removed surgically, and that he be treated with radiation and chemotherapy which had caused significant damage to the remaining right lung.

And basically, that the underlying cause of Mr. Tompkin's death was this adenocarcinoma primary in his right lung.
Q. And just for the record, I don't know if I said this or not, frankly, but is your opinion based upon reasonable medical certainty?
A. Yes, it is.
Q. And I'd like to ask you that any opinions that you express in this case, please base them upon a level of reasonable medical certainty.
A. I will.
Q. Following the autopsy, the pathology work you did, the review of the records, the K-Ras study, the P53 study, the fiber burden study, did you and do you have an opinion, based upon reasonable medical certainty, as to the cause of David Tompkin's lung cancer?
A. I should also mention there was one other study that was done and that --
Q. Forgive me.
A. We also sent tissue to Johns Hopkins where a chromosomal --
Q. I want to come to that later, with your permission.
I do want to cover that, but I want to hold it for now.
A. Based on all of the information that we gleaned from

these studies, yes, it was my opinion that Mr. Tompkin's primary lung cancer was due to a -- due to the combined effect of his cigarette smoking and his exposure to asbestos.
Q. And is that still your opinion?
A. Yes, it is.
Q. Based upon reasonable medical certainty?
A. Yes, it is.
Q. Would you -- would you tell us why you state it was caused by both the asbestos exposure and his smoking?
A. Well, I understand from the medical records that

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Mr. Tompkin had a period from about 1950 to 1965 where he smoked a variable amount, up to two and a half to three packs of cigarettes per day.

He then ceased his cigarette smoking about 1965. He developed his lung cancer, at least it was diagnosed, in, I believe, 1992.

So we are talking there about a 27 year interval.

I also note from the digestion studies that we did of his lung tissue, that Mr. Tompkin had, even though we didn't see the asbestos bodies by the light microscope, the evaluation for fibers demonstrated that he had a high load of asbestos fibers in his lung, on the order of about a million fibers per gram of dry lung

weight. And this is a significant burden of asbestos in the lung.

In fact, in some patients, this would be enough asbestos to have caused this fibrosing disease called asbestosis.

Q. Can I stop you there one second? Just while you are there.

Did -- but he did not have asbestosis?

A. He did not have asbestosis, but he had a level of asbestos within his lung that conceivably could have caused asbestosis. But, no, he did not have the fibrotic change. So he had not developed asbestosis.

Q. Thank you very much.

A. I'm talking strictly about an elevated level of the fibers that were retained within his lung.

And I think it's a basic principle of the pathology of asbestos-related disease that asbestos interacts with cigarette smoking by a process that we call synergy. And what I mean here is that cigarette smoking is the most important lung carcinogen or cause of lung cancer that we know of.

Asbestos can cause lung cancer, but it's a relatively weak carcinogen. When the two of them occur simultaneously, in the same patient, they have an effect which is beyond an additive effect of each of their

potencies.

And this is a process that we call synergy, where the two injurious substances in some way act together to potentiate greatly the effect of each of those substances.

And I believe in this case, with the high level of asbestos present, with the history of cigarette smoking, even though it was 27 years before and for only 15 years, I believe that the combination of those two factors greatly increased his risk for developing lung cancer. And I would associate his lung cancer development and tie it to both of these injurious substances.

Q. Do you see many lung cancers that involved -- that involve asbestos alone without smoking cigarettes involved?

A. I have never seen one.

And if you look in the literature, such cases are very rare; that is, patients who have lung cancer due to asbestos who have not also smoked cigarettes.

Q. These opinions, again, so they have all been based upon reasonable medical certainty, is that correct?

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A. Yes.
Q. Now, I'd like to talk about -- Dr. Sidransky will be here to talk about it himself and about his opinions, but I want to ask you: Were materials sent this year to Dr. Sidransky at Johns Hopkins?

A. Yes, they were. And the materials that were sent were sections that were cut from the tissue from Mr. Tompkin's autopsy.
We -- I sent Dr. Sidransky sections from the lung tumor that we had saved from the autopsy, and also from a nontumorous organ, the kidney that he could use as a control for the purposes of him to do some specialized genetic studies that would help to define the origin of Mr. Tompkin's lung cancer.
Q. And did you receive a copy of his report?
A. Yes, I did.
Q. And can you tell us in essence what the conclusion of his report was without going into all the details?
A. Can I refer to the report?
Q. Absolutely.
A. Basically it was a very short report, that basically states that a number of chromosomal mutations were found in Mr. Tompkin's lung cancer tissue, and the number and types of the mutations that were seen fit the pattern of what Dr. Sidransky has identified in adenocarcinomas caused by cigarette smoke.
Q. And can you tell us the effect that his report has upon the opinion that you've testified here to today and which you held prior to his studies being done?
A. I believe that Dr. Sidransky's report only bolsters

the original opinion which I held that Mr. Tompkin's tumor was caused by his cigarette smoking. And then when we found the asbestos, that it was due to this synergistic effect.
Q. You've had custody basically of the slides and tissue of David Tompkin for the last six or seven years primarily, is that true?
A. Ever since we did the autopsy, I've more or less been the custodian of this material.
I've sent it out to those who have requested it for whatever purposes they wanted to related to this case.
Q. And you've sent it out at my request at times, is that right?
A. Yes, I have.
Q. And you've sent it out at defense attorneys' request at times?
A. I didn't actually send it out, but I turned it over to the defense.
Q. For them to do whatever they wish?
A. Yes.
Q. And the material sent out to Dr. Sidransky was something I requested you to do?
A. It was at your request.
MR. SMITH: That's all I have, sir. Thank

you.
THE COURT: Cross-examine.

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MR. McLAUGHLIN: Thank you, Judge.

CROSS-EXAMINATION OF JOSEPH TOMASHEFSKI

BY MR. McLAUGHLIN:

Q. Good afternoon, Dr. Tomashefski.

A. Good afternoon.

Q. Nice to see you again, sir.

A. Nice to see you.

Q. You may recall me, I'm Patrick McLaughlin.

A. Yes.

Q. And in this case I represent the Lorillard Tobacco Company.

Now, Dr. Tomashefski, you are testifying here as an expert witness, is that correct?

A. That is correct.

Q. Not as a treating physician with respect to Mr. Tompkin?

A. I never treated Mr. Tompkin.

Q. Okay. And, sir, in your practice as a pathologist, do you customarily treat patients or are you a clinician?

A. My role as a pathologist, we're often called the doctor's doctor. We make the diagnoses so that the treating physician knows what to treat.

Q. So customarily you do not treat patients?

A. That's right.

Q. But I assume, sir, that if you did, and your patients smoked, you would advise them to quit smoking, right?

A. Yes, I would.

Q. All right. And that's because there are certainly health benefits to quitting smoking, would you agree with that?

A. Yes, I would.

Q. Now, Doctor, I understand from your testimony that you performed the autopsy on Mr. Tompkin at the request of Mr. Smith, is that a fair statement?

A. Yes, it is.

Q. Okay. And upon that autopsy, you could find no pathologic evidence that David Tompkin had been a smoker, is that correct?

A. Well, I don't quite understand what you mean by pathologic evidence that he had been a smoker.

Q. Well, isn't it a fact that there was nothing unique about Mr. Tompkin's lung cancer that distinguished it from the lung cancer that you would find in a never-smoker, is that correct?

A. Well, an adenocarcinoma from a smoker versus a nonsmoker would look similar.

However, the mere fact that Mr. Tompkin had an adenocarcinoma primary in his lung indicated more likely

than not that he had been a cigarette smoker. So that in and of itself was, in my mind, some evidence of cigarette-induced disease.

Q. I see. Well, all you needed to know really was that David Tompkin had been a smoker, and that was enough evidence in your mind to sort of point in that direction in the first place, isn't it?

A. To an extent.

I also wanted to know the degree of his smoking, when it occurred and how much.

Q. Okay. Well, prior to performing the autopsy, were

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you, in fact, advised by counsel that Mr. Tompkin had been exposed occupationally to asbestos?
A. I believe at the time that we were asked to do the autopsy, there may have been some suggestion to please evaluate for asbestos-related disease.
Q. Okay. Well, were you advised prior to the autopsy that Mr. Tompkin had been exposed occupationally to silica?
A. No, I was not advised of that.
Q. Or that he had previously worked in the rubber industry?
A. I did not know that.
Q. Okay. Were you advised prior to performing the autopsy that Mr. Tompkin had a family history of cancer?
A. Prior to performing the autopsy, I did not know that.

Q. Well, in fact, before you -- before you performed the autopsy, you weren't given much information at all, were you?
A. Not a lot of information.
Q. Okay. Fine. And following the autopsy you performed, sir, you prepared an expert report in this case, and I believe the date is October 20th of 1997.
Is that correct?
A. Yes, that's correct.
Q. Okay. Now, in that -- in that report, sir, you did not report on, nor did you find, evidence of asbestos present in Mr. Tompkin's lungs, isn't that correct?
A. That's correct. At that time, we had done the stain for asbestos bodies. We did not find them. And so, therefore, I had no direct evidence that Mr. Tompkin had an asbestos-related problem.
Q. By the way, sir, before you performed your autopsy, had you been advised by counsel that Mr. Tompkin had quit smoking cigarettes 30 years before he passed away?
A. I do not believe I was informed of that prior to starting the autopsy.
Q. Okay. Well, and in that first report, that October 20th, 1997 report, you opined that cigarette smoking was the cause of Mr. Tompkin's lung cancer, is that correct?

A. That is correct.
Q. Cigarette smoking was the sole cause --
A. Yes.
Q. -- in that report?
Then in December, I think on December 20th of 1997, your discovery deposition was taken in this case.
You may recall that day?
A. Yes, I do.
Q. It was near to Christmas.
A. Yes.
Q. It was probably a cold and wintery day in Cleveland?
A. It was.
Q. And as a consequence of questions asked of you during that deposition, very shortly thereafter, you decided to do additional tests which you've actually talked about here today on the witness stand, have you not, sir?
A. That is correct.
Q. Okay. Now, in fact, Doctor, you decided to do two tests, and I'm going to take initially the P53 and the K-Ras, two tests which you believed would bolster your

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opinion that cigarette smoking was the cause of Mr. Tompkin's lung cancer, is that correct?
A. If they had been positive, yes.
Q. And you directed that immuno staining for the P53 gene product test be performed, and it was performed at

Metro? I still call it Metro General.
A. Yeah, we -- a lot of us do.
Q. Which is the hospital you are still at.
That test was performed there and has -- and when it came back, the test was negative, is that right, sir?
A. That is right.
Q. And a negative test means that it did not bolster your opinion that cigarette smoking was the cause of David Tompkin's lung cancer?
A. Well, only about a third of lung cancers caused by smoking will have the P53 product.
Q. Let me ask you this: Had the test come back positive, you would say that it would have bolstered your opinion, right?
A. Yes.
Q. And that's why you performed the test?
A. Yes.
Q. So when it came back negative, then it did not bolster your opinion, correct?
A. Did not.
Q. Okay. And then the -- you further directed that a test for mutations in Codon 12 of the K-Ras oncogene be performed, and I think you sent that over to the Netherlands, and Dr. Offerhaus --

A. Yes.
Q. -- performed that test over there, is that correct, sir?
A. That is right.
Q. And he found and reported to you, sir, that that test was also negative?
A. Negative, but with a little bit of equivocation in that initially the report we got was that it was positive. However, they found some material also in their control.
Q. Right.
A. So they repeated it, and it was negative.
Q. Right. And --
MR. SMITH: Let him finish, please.
MR. McLAUGHLIN: I'm sorry.
MR. SMITH: I'm sorry.
A. It was negative.
So his inclination was then to call the tests negative. And ordinarily he would have done a third trial run as kind of the tie breaker.
That third trial run was never done. We were under time constraints. So we went with his negative opinion.
Q. Well, and you've had time since then? I mean, these tests were done in 1997, early '98?
A. That's true.

Q. Okay. Now, and you have no additional tests were done?

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A. No additional tests were done.
Q. But I think more importantly, Dr. Tomashefski, Dr. Offerhaus's lab construed that as a negative finding, did they not?
A. And his report states that.
Q. Okay. And your testimony here today before the ladies and gentlemen of the jury is that that is a negative test, the K-Ras test was a negative?
A. Yes, it is.
Q. Okay. So then as in the P53 test, the negative K-Ras test did not bolster your opinion that cigarette smoking was the cause of Mr. Tompkin's lung cancer, is that correct, sir?
A. That's correct.
Q. Okay. Now, you also directed that a third test be performed, and that's the asbestos fiber burden --
A. Yes.
Q. -- analysis be performed on the autopsy slides.
But I'd like to work, if I may, Dr. Tomashefski, a little bit on the chronology of that.
You had not -- you had not performed that test prior to your writing the first report you issued in this case, is that correct?

A. That's correct.
Q. And the reason why you decided to do the asbestos fiber burden analysis is because asbestos is one carcinogen that you could evaluate, is that correct?
A. That is correct.
At the deposition that you spoke of, I was questioned about a variety of carcinogens, and I responded that there were very few of them that I could evaluate using the techniques at my disposal.
But certainly I could further evaluate asbestos.
Now, if I could say usually, usually in individuals who have no asbestos bodies in their microscopic slides, usually those patients have a low asbestos burden in their lung and you are not concerned about asbestos-related disease.
There's a very small minority of cases in which the asbestos bodies are negative in the slides, but yet the amount of fibers in the lung are high.
And it just so happens that Mr. Tompkin is one of those.
Q. Now, and again, this is -- this is after your first report but going --
A. Yes, sir.
Q. -- going back, sir, to the initial autopsy, and as

you indicated in your first report, when you performed the autopsy, you looked for asbestos at a very superficial level, is that correct?
A. In the sense that asbestos bodies are a -- are present and in a great minority to the number of asbestos fibers.
But at the light microscopic level, that's one of the only ways we have of evaluating for asbestos.
Q. Okay. Well, when you did the -- or had the mineral analysis and asbestos fiber burden test done, it was reported to you and you found significant numbers of

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asbestos fibers present in Mr. Tompkin's lungs, is that correct, sir?
A. Well, on the order of a million fibers per gram. And in certain areas, up to five million fibers per gram.
Q. Okay. And in fact, five million fibers per gram of dyed lung tissue grades clearly as above background exposure levels, and it puts it within the, what's considered to be the low range of asbestosis, is that correct, sir?
A. That was my opinion, yes.
Q. And but I think you said that clinically, you don't believe that Mr. Tompkin had asbestosis, but the level of asbestos fibers in the lungs puts him at a low end range of asbestosis, right, sir?

A. Well, if I could just reexplain that.
Not only clinically, but pathologically, I looked at his lung tissue and he did not have the fibrotic changes that we associate with asbestosis. I do not believe that he had asbestosis.
Q. All right, sir.
A. But he did have an amount of fibers within his lung that is usually seen in patients who do have asbestosis.
So we call that the asbestosis range of fiber burden, but it was at the very low end of that range.
Q. And based on the asbestos fiber burden analysis which you performed after your deposition was taken, you reached a new conclusion that asbestos was a co-player in causation here, is that right, sir?
A. Well, I couldn't ignore that quantity of asbestos fibers being within the asbestosis range, and I should say that's important because as a pathologist, in order to ascribe a lung cancer as being caused by asbestos, we need to see a very high burden of asbestos fibers. And usually that's a burden which causes asbestosis.
So as a pathologist, I usually don't diagnose lung cancer due to asbestos unless the patient has asbestosis or a high fiber burden that is usually associated with asbestosis.
In Mr. Tompkin's case, the fibers were there,

but they had not caused the damage to his lung to produce the disease asbestosis.
But on the basis of that high fiber burden, I couldn't ignore that, and in fact conceptually it made a lot of sense to me that the asbestos interacted with the cigarette smoke as co-carcinogens to cause his lung cancer.
Q. The point is, Dr. Tomashefski, that after performing these three additional tests, you changed your initial opinion in this case, didn't you, sir?
A. Well, I did change it based on new evidence that I had before me.
Q. Right. New -- and of course, these tests were tests that you could have conducted initially but chose not to, is that correct, sir?
A. That's correct.
Q. Okay. Now, and I believe your testimony here today in front of the ladies and gentlemen of the jury is that the new opinion was the combined, I believe, synergistic effect of cigarette smoke and asbestos are the causes of Mr. Tompkin's lung cancer?

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A. That is my opinion.
Q. All right. But you don't know, nor do you think that anybody really knows, how asbestos and cigarette smoke interact to produce this so-called synergistic effect, is that correct, sir?

A. I don't believe the mechanisms are known.
Q. Now, synergy, is that sometimes referred to in the literature as multiplicative, the multiplicative effect of asbestos and tobacco?
A. Well, not exactly. The terms are not synonymous.
Q. Okay.
A. Synergy really means an effect which is greater than the additive effect of each of the components.
That may be multiplicative, in other words multiplying the effect together, or it may be more than multiplicative, or it may be less than multiplicative, but still more than the additive effect of each.
And that would still be synergy.
Q. Well, are you using it here to the extent that you equate synergy to multiplicative effect?
A. I frankly don't know.
Q. You don't know the answer to that?
A. I don't know in this case if it was multiplicative.
Q. All right.
A. All I know is that the presence of both carcinogens have the potential of interacting in a way that greatly increases the potency of each of them if they were added together.
Q. So your opinion today is not that there was a multiplicative effect here of tobacco and asbestos, is that

correct, sir?
A. My opinion is that there was a synergistic effect.
Whether it was multiplicative, whether it was more than multiplicative or less than multiplicative, I don't know.
Q. Now --
A. My opinion is that there was a synergistic effect.
Q. Right. Right. And notwithstanding the fact that Mr. Tompkin had quit smoking 30 years before he passed away, you still believe that there is an effect of cigarette smoking and asbestos?
A. Yes. In fact, he was smoking at the time that in his deposition he claimed he was exposed to asbestos, and certainly there can be long latency periods between the initial injury to the genetic material and the final evolution of cancer.
Q. Now, I take it, sir, you are not testifying here today as an expert in the field of epidemiology?
A. No, I am not an epidemiologist.
Q. You did look at some of the studies, though, I take it, with respect to the issue of synergy, I take it, in the medical literature?
A. Yes, I've reviewed that material, some of those papers.
Q. And didn't you see, sir, that when synergy is

discussed, those studies frequently talk about smoking and asbestos exposure happening at the same time, concurrent

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exposures of cigarette smoking and asbestos?
A. That's true.
Q. Okay. And is that fact relevant at all to you, sir?
A. Not really. I think the fact that there had been this long interval in which Mr. Tompkin had not smoked cigarettes doesn't negate my opinion that there might have been or that there probably was a synergistic effect.
Some of the major pathology textbooks, including a recent article by an international panel of experts looking at cigarette smoke and asbestos and the cause of lung cancer, have indicated that any cigarette smoking, even that which had occurred over 20 years prior to the development of lung cancer, should be considered as important.
Q. Well, sir, in your review of the literature, did you ever see a case that was like Mr. Tompkin's; that is, smoking for 15 years, quit at the age of 30, a 15 year pack history of smoking and a death 30 years following smoking cessation, did you ever see any cases like that in any of the literature you reviewed?
A. Well, a lot of the literature are series of patients. They don't go into the kind of detail that you would have to analyze on a case-by-case basis so, no, I haven't seen

individual case reports like this.
Q. Now, you know that Dr. Feingold is also an expert witness in this case?
A. Yes, I've been told that.
Q. Okay. You have not seen Dr. Feingold's report?
A. No, I have not.
Q. All right. Now, however, you did receive a call from Dr. Feingold some months ago in which he suggested to you on the phone that it would be a good idea to have some additional testing done here, is that correct, sir?
A. Yes. I received a call in my office one day from Dr. Feingold. He introduced himself. I did not know who he was.
And he indicated to me that he would suggest doing additional tests which might further try to establish whether Mr. Tompkin's tumor was related or caused by his cigarette smoking.
Q. I see. And that additional testing, of course, was not something that you've discussed in terms of the P53, the K-Ras or the fiber burden analysis on asbestos, was it?
A. No, this was long after those had been completed and that report had been written.
Q. Okay. He was talking about the LOH testing to be done by Dr. Sidransky in Baltimore?
A. I have no idea, because he never identified what the

testing was.
Q. Well, when -- so then you didn't know at that time when you spoke with Dr. Feingold which additional testing he was actually talking about?
A. No, I did not.
Q. Oh, I see. Well, when Dr. Feingold called you out of the blue, it was your impression that he was indicating that additional testing might further support the contention that this was a smoking-related lung tumor, is that right?
MR. SMITH: Object.

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A. That was my inference of his conversation.
MR. SMITH: Excuse me. Object. I move to strike.
THE COURT: I stated I don't want witnesses questioned about what other witnesses have done.
So the objection is sustained. The last answer is stricken, and the jury is instructed to disregard it.
You can talk to Dr. Feingold about that.
MR. McLAUGHLIN: Thank you, Your Honor.
Q. This was a conversation that you had directly with Dr. Feingold, correct?
A. Yes. On the telephone.
Q. All right. Now, Dr. Tomashefski, for purposes of

your opinions in this case, I take it you accept as true and accurate what David Tompkin said in his deposition testimony with respect to how long he smoked, how much he smoked, what brands he smoked?
A. I accept what was said.
I don't know if it was true and accurate.
Q. Okay. You don't have any better knowledge than Mr. Tompkin would have about that, do you, sir?
A. No, I don't.
Q. Okay. Now, can you help me out in defining a term, Doctor?
Are you -- are you familiar with Stedman's medical dictionary, 24th edition?
A. I usually use Dorland's.
Q. I don't have that.
MR. McLAUGHLIN: May I approach, Your Honor?
Q. I wondered -- I have tabbed a page, and I wonder if you might help me out in the definition of hypothesis.
And --
THE COURT: Hypothesis as a medical term?
MR. McLAUGHLIN: Hypothesis as a medical term, yes, Your Honor.
THE COURT: Separate from the way we normally talk about a hypothesis?
MR. McLAUGHLIN: Yes, Your Honor. Hypothesis

as a medical term, in the medical dictionary.
Q. And I have -- and I wonder if you might look at the definition of hypothesis in the dictionary, and tell me whether or not you would agree this is just a restatement of what you have in front of you, Doctor.
A. I can read the definition.
Q. Okay.
A. And I agree with this definition.
Q. Would you read it, please, sir?
A. "A supposition or assumption advanced as a basis for reasoning or argument or as a guide to experimental investigation. A tentative theory unsupported by the essential facts that would prove its truth."
Q. Now, and you agree with that definition, don't you, sir?
A. I think that's what a hypothesis is.
Q. Okay. And we are talking about hypothesis in the medical sense, correct?
A. Yes.
Q. Yes. Now, Doctor, would you agree a hypothesis can

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be merely speculation or conjecture?
A. Yes.
Q. Okay. Thank you.
MR. McLAUGHLIN: One minute, Your Honor.
(Pause).

MR. McLAUGHLIN: Can you give me just one second, Your Honor?
(Pause).
MR. McLAUGHLIN: All right. I have no further questions, Your Honor.
Thank you, Dr. Tomashefski.
THE COURT: Let's take this down, then. There is no need to keep that up there.
MR. McLAUGHLIN: Yes, sir.

CROSS-EXAMINATION OF JOSEPH TOMASHEFSKI

BY MR. SUFFERN:
Q. Hello, Dr. Tomashefski.
A. Hi.
Q. My name is Michael Suffern, I represent the American Tobacco Company, and you probably don't remember me because I didn't have a big role at the deposition, but I was there in your office up at Metro, Metro General when we took your second deposition.
A. Yes.
Q. Just have a couple of -- couple questions for you today, sir.
A. Sure.
Q. You were explaining with your drawing that there are certain diseases that can be caused by exposure to asbestos, correct?

A. Yes.
Q. You said that one of the actual disease processes that can be caused by exposure to asbestos is a fibrotic reaction, a scarring, isn't that fair?
A. Yes, asbestosis.
Q. Now, I know you have already told the jury and the Court that you didn't find any asbestosis in Mr. Tompkin's case, is that correct?
A. That's correct.
Q. But you did find fibrosis in his lungs, didn't you?
A. Yes, I did.
Q. Okay. You also told the jury and the Court that another actual disease process that can be caused by exposure to asbestos is pleural plaque, is that right?
A. Yes.
Q. And you also found pleural plaque in Mr. Tompkin's lungs, didn't you?
A. We found one solitary pleural plaque on his left diaphragm.
Q. Thank you.
You then told the jury that there are various disease processes that can be caused by cigarette smoking, correct?
A. Yes.
Q. And some of the disease processes that you told the

jury can be caused by cigarette smoking were chronic bronchitis, correct?

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A. Yes.
Q. Emphysema?
A. Yes.
Q. And chronic obstructive pulmonary disease or COPD, correct?
A. Yes.
Q. Now, you looked at the tissues from Mr. Tompkin's lungs under the microscope, and you did not find any evidence of chronic bronchitis, emphysema or COPD, is that correct?
A. That's correct.
Q. Okay. One other thing I want to ask you about.
You talked about looking for asbestos bodies?
A. Yes.
Q. And the way you do that, I'm not a doctor, but I think from this case I've learned a little bit about this.
And the way you do it is you put a stain on some of the pathology tissue?
A. That's right.
Q. It's called -- I think the test you used was the Prussian blue stain?
A. It's the Prussian blue stain for iron.
Q. For iron. And the reason you look for the iron is

that this stain somehow finds the iron which surrounds the asbestos body, and that, it kind of sticks to it, and then you can see the asbestos body or you can see the iron where the stain had stuck to it under a microscope.
Correct?
A. Yes, I should explain that the asbestos body is really the lung's reaction to the asbestos fiber.
That the fibers are invisible under the light microscope. But within the lung, these fibers can get attacked by the macrophages in the lung. They are surrounded, engulfed, and these macrophages encoat the fiber with this iron to produce the asbestos body.
And once this structure is formed, we can then see it under the microscope. And if we do this stain for iron, it makes -- it's relatively easy to find these structures.
Q. It's relatively easy to find them and they look like -- they kind of look like maybe, I don't know if this is fair or not, but they look like a little blue worm kind of under the microscope, is that fair?
A. Can I draw a picture?
Q. Sure. Please.
A. These structures -- and I'll use the -- this marker here. These structures have also been called shish kebab bodies, caterpillar bodies.

Q. I like "worm."
A. And curious bodies.
And basically what you have is the thin asbestos filament, which is invisible, it's thinner than any hair on your head, and it gets encoated by the macrophage and iron gets deposited on it. So then we have a much larger structure that looks like this.
You can see them under the microscope even if you don't stain for iron because they have a nice brown appearance. But if you apply the stain for iron, they turn a brilliant blue.

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And those can be readily identified using the simple light microscope.

And they are a marker of asbestos exposure.

The problem is that relatively few fibers are coated in this manner, so it's really not a good accurate assessment of the burden of fibers present.

Q. Thank you, Doctor. I appreciate that explanation and the only, the only question I have to follow-up on that is that you did that test, you looked at the tissue under the microscope, and you did not find any such bodies present in Mr. Tompkin's lungs, correct?

A. That is correct.

Q. Thank you, sir.

MR. SUFFERN: That's all I have.

THE COURT: Any other defendant want to cross-examine?

MR. COFER: No questions, Your Honor.

MR. WALSH: No questions, Your Honor.

THE COURT: Redirect.

REDIRECT EXAMINATION OF JOSEPH TOMASHEFSKI

BY MR. SMITH:

Q. Your opinions are the same as they were?

A. They haven't changed.

MR. SMITH: We have no questions.

Thank you. Thank you very much, Doctor.

THE COURT: You may step down.

(Witness excused).

THE COURT: We will take a -- excuse me.

MR. McLAUGHLIN: Interim argument.

THE COURT: Yes. The defendants requested interim argument?

MR. McLAUGHLIN: We did, Your Honor.

THE COURT: Proceed.

MR. McLAUGHLIN: Ladies and gentlemen of the jury, this is an opportunity for me to make an interim argument at this time with respect to Dr. Tomashefski -- Dr. Tomashefski's testimony; not with respect to Dr. Tomashefski.

He's obviously a very bright physician, and

all of us can learn from Dr. Tomashefski in many things. However, what's important is his testimony in this case.

And, remember, I told you on opening statement that we need to look at reliability, objectivity and credibility. And we established at least in this sense with Dr. Haas that the jury should have all the facts.

Now, it's clear from Dr. Tomashefski's testimony that Dr. Haas did not have all the facts, because he only had the first autopsy report. We now know from Dr. Tomashefski that after he initially prepared his report on October 20th, 1997, his deposition was taken, he was asked a lot of questions he couldn't answer. He went back and did --

THE COURT: Well, now, wait a minute.

That's an unfair comment, counselor.

The jury is instructed to disregard that. When you say a lot of questions he couldn't answer, that hasn't developed and that's -- you are testifying now.

MR. McLAUGHLIN: All right.

THE COURT: The jury is instructed to disregard that statement.

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MR. McLAUGHLIN: I withdraw that. I withdraw that comment, then, Your Honor. I'm sorry.

He, after his deposition was taken, he went and performed three tests he had not performed when he did

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the first autopsy; P53, the K-Ras. He did both of those in order to bolster his opinion that cigarette smoking caused cancer. However, the results were negative; they did not bolster his opinion.

In addition, he did the fiber burden analysis for the asbestos. And when he didn't find it on initial autopsy, this test proved that asbestos fibers were present in David Tompkin's lungs at a level within the low range of asbestosis.

Now, the fiber burden analysis is pathology. You are going to hear more about pathology in this case from other doctors.

What's important, though, is that we are seeing the development of and the progression of the evidence in the case to show that all the tests must be considered by all the physicians. All the evidence must be considered in order to reach the correct conclusion in this case.

And I think we demonstrated here that we are getting -- beginning to get all the evidence into the case and before the jury.

Thank you.

THE COURT: Thank you.

MR. SMITH: Briefly, Your Honor.

THE COURT: Certainly.

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MR. SMITH: Please.

May it please the Court, ladies and gentlemen of the jury, you've just seen Dr. Tomashefski. It will be up to you to make a determination on his credibility, his knowledge and what he did. That will be within your province and what you do everyday of your lives.

Dr. Tomashefski, I submit to you, the evidence has shown, he ran towards science, not away from it.

That he gave tissues to the other side. They will -- that's -- that's their case, what they do with their tissues. He -- I don't know what more the man could have done.

He also testified this to you, and you've heard his experience in this field involving asbestos, involving pulmonary pathology. He testified to you under oath that in all the involvement he's had in his field, he has never seen one case where asbestos without smoking caused lung cancer.

Conversely, he said to you that lung cancer is the greatest cause -- I mean is most greatly caused by smoking more than any other toxin. Smoking is the cause of lung cancer.

When -- I submit to you that he testified that when he learned there was an asbestos burden, he

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wasn't afraid to add it, and he did. And he should have.

And he's told you that in his opinion, based upon what he did, that he thinks they both caused it, and I submit to you that you have to decide that.

I have my own opinion. You'll have to have yours. I just ask you to consider it. It looks pretty

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clear to me.
Thank you.
THE COURT: We will take -- we will take a recess at this time.
You may file out.
(Jury out).
THE COURT: You got more people for the rest of the day?
MR. SMITH: Your Honor, we have Dr. Cross who should be here now, who was the radiation oncologist.
THE COURT: Beyond him?
MR. SMITH: We have the two daughters here, and Mrs. Tompkin is here, and we had some depositions we would like to go over with the Court at some time.
THE COURT: All right. We will get into as much as we can today. We are having a little better day than we had the last two days. We will be back in about ten minutes.
(Recess taken)

THE COURT: Please be seated. Please call your next witness.
MR. NACE: Your Honor, the plaintiff calls Debra Eckart.
THE COURT: Very well, please come forward.

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DEBRA ECKART

called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

- - -

DIRECT EXAMINATION

BY MR. NACE:
Q Would you state your name please?
A Debra Eckart.
Q Where do you live?
A [DELETED]
Q Thank you.
Would you tell the jury your relationship with David Tompkin, please?
A I'm his daughter.
Q How old are you?
A I'm 44.
Q And do you have any brothers or sisters?
A Yes, I have two sisters.

Q And do you have any children?
A Yes, I have two daughters.
Q Can you tell me how old are your children?
A 19 and 16.
Q And their names?
A Christine is 19 and Sarah is 16.
Q When you were younger and living at home with your family, could you tell us the types of things that you would have done together as a family?
A Well, we went to the cottage, when they got the cottage, and we played games after we ate supper a lot. And sat around and talked.
Q Where was the cottage?
A Leesville Lake, Ohio, down in southeast of here.
Q And this was a vacation home?
A Yes.
Q And when did you go there?

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A We usually went on the weekends.
Q What type of thing would you do when you went down to the cottage?
A Well, every once in a while my dad and I would go fishing and I would play in the creek; there was a creek beside there, get the crayfish and stuff. And at night we would have campfires and roast marshmallows and hot dogs and stuff.

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Q You mentioned games, playing different types of games?
A Yes.
Q What type of thing would you play with the family?
A We played Life and Monopoly and Uno, a lot of Uno, and Rummy and card games, things like that.
Q So this was the type of thing in the evenings the family would gather around?
A Yes.
Q I believe you mentioned some vacations other than the cottage?
A Oh, yes. When I was in high school, my dad and I, just my dad and myself, we went fishing up in Canada with my uncle and my two cousins. And it was just him and I and them. And then when I was in tenth grade we went to Florida, the whole family, and we went to -- actually he went fishing that time also by himself.
Q Were there other types of things that your dad liked to do other than the fishing or playing games that type of thing?
A Well, later on he started to do woodworking, made boxes, and like made my daughter's treasure chest when they were younger. And, oh, he made me some tables. Things like that.
MR. NACE: Your Honor, I would like to display some pictures for the jury with the court's

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permission. DIRECT - ECKART
THE COURT: You mean on the screen?
MR. NACE: Yes.
THE COURT: Yeah, go ahead.
MR. SMITH: 97.001.
BY MR. NACE:
Q This is 97.001, could you tell us what this represents?
A This was one time we had an Easter egg hunt over at my parents' house, that's their backyard, and you can see myself, that's my husband in the background and my youngest daughter in the front. And then my other daughter is over to the side. She's not quite in the picture.
Q And I notice a lot of brick up there?
A Yeah.
Q Where did that come from?
A My father, he built that.
MR. NACE: Next one, please.
MR. SMITH: 102.007.
BY MR. NACE:
Q Could you tell us what 102.007 represents?
A That's my father fishing. He's with my Uncle Bruce, that's quite a while ago, I'm not sure of the date. But I believe it's in Canada.
Q The sideburns kind of got away?

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A Well, he liked those sideburns.
Q Was -- this is the same place you would have gone

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fishing with him?
A I believe it is. It could be my Uncle Bill's cottage up in, I think it's Tweed, Ontario.
MR. NACE: Next one.
MR. SMITH: 95.001.
BY MR. NACE:
Q Could you tell us what 95.001 represents?
A This is my parents' 30th wedding anniversary. And we rented a limo for them and took them out to eat. Just the adults. My children didn't go. And we all went on the limo ride and went out to eat and that.
MR. SMITH: 84.001.
BY MR. NACE:
Q And could you tell us what 84.001 depicts?
A I believe this is in Florida when we went to Florida, I'm not sure, but he's fishing. But I'm pretty sure that's Florida.
Q That's your dad?
A Yes, that's my father, fishing.
MR. SMITH: 96.001.
BY MR. NACE:
Q And could you tell us what 96.001 depicts?
A This is his birthday. And that's my children in the

front when they were younger. And that's my grandfather, my dad's dad in the back, my husband is over there. And it was my dad's birthday party.
Q And Debra, could you tell us whether at some point your father had a serious illness?
A Before the cancer?
Q No.
A Well, yeah, he had, yes, he had cancer.
Q And could you tell us how that illness affected him?
A Well, he had to quit working, he had to retire early. My mom and dad, they would go on cruises a lot and he really wanted to go on cruises, he couldn't any more. He really missed that, he really had to -- he couldn't spend time with my mom and him when he retired, he never really got to retire.
Q And could you tell us how it's affected the family?
A We miss him very much.
MR. NACE: No further questions.
THE COURT: Any questions?
- - -
CROSS EXAMINATION
BY MS. CHAPMAN:
Q Good afternoon Mrs. Eckart. My name is Diane Chapman and I'm one of the attorneys for Philip Morris. And you and I have met before several years ago in my office. I don't

know if you remember. SS - ECKART
A Vaguely.
Q If at any time, in response to any of my questions, you want to take a few minutes and think about it, that's fine.
The first question I ask you is on behalf of all American families everywhere who have ever played Monopoly, has your family ever successfully completed a game without having somebody in the family storm off or have hurt feelings? Have you guys ever mastered that?
A I don't remember, actually, to be honest with you. We probably had little squabbles.
Q Well, it sounds like you had a wonderful close knit

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family where you had an opportunity to spend time together, your mother and father and sisters, is that correct?
A Yes.
Q And you were very proud of your dad, is that correct?
A Yes.
Q Your dad was a very hard worker?
A Yes.
Q He had a lot of common sense?
A Yes.
Q He was involved in, interested in what went on in the world, is that correct?
A Pretty much, yes.

Q He read the newspaper like the Akron Beacon Journal?
A Yes.
Q He enjoyed educational programs like the Discovery Channel?
A Yes.
Q He was a smart guy?
A Yes.
Q He had a circle of friends who respected him and enjoyed working with him, is that correct?
A Yes.
Q Your dad told you that he loved you, I'm sure?
A Yes.
Q And during the time when your dad was so ill, was it of comfort to him that you and your sisters and your mom were able to spend time with him?
A Yes.
Q And I'm sure that was important to you?
A Yes.
Q So at least in your mind, at the time when your dad needed you, of whatever little comfort it might have been, at least he knew that you were all there for him, is that?
A Yes.
Q Mrs. Eckert, I only have one last question.
The date on which you found out that your dad had this disease, that he had lung cancer, was that in fact

told to you on your birthday, would that?
A No, what I said, that they found something that they think it was cancer, but I did not learn that it was lung cancer until later.
Q Okay. But on, and just for the jury, your birthday is June 15th, is that correct?
A Yes.
Q Okay. And your dad's diagnosis was in 1992, is that correct?
A I can't remember.
Q You are not sure of the year?
A No, no.
Q The reason I ask, at the deposition, when you were asked when you discovered that your dad had lung cancer, I believe you told me it was on the date of your birthday?
A No, I didn't.
MR. NACE: I object. I don't think that's the testimony.
THE COURT: Well, it's cross examination. You don't get to interrupt the cross examination.
BY MS. CHAPMAN:
Q Mrs. Eckart, you do recall at some point in time, in 1998, July 7th in fact, you did give a deposition, is that correct?

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A Yes.

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Q And the question that was put to you is, do you remember when your dad was diagnosed with cancer?

And I can show you the answer.

THE COURT: Just read the question and the answer and ask her if it is true or not true.

MS. CHAPMAN: Thank you, your Honor.

Q The answer --

THE COURT: No, no. Did I ask this question and did you give this answer.

BY MS. CHAPMAN:

Q Did I ask the question: "Do you remember when your dad was diagnosed with cancer?"

And if I hand you this I would --

THE COURT: No, I don't want to hand it. Ask her if in fact she gave whatever answer it was.

BY MS. CHAPMAN:

Q Is this the answer you gave at that time. "I don't know the exact day, but oh, yes, they told me on my birthday, that's right, June 15th. Let's see it would be five years ago, it might be six is now."

THE COURT: Did you give that answer?

THE WITNESS: Yes.

MS. CHAPMAN: No further questions. Thank you.

THE COURT: Anything further.

MR. NACE: Nothing further, your Honor.

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THE COURT: You may step down.

Please call your next witness.

MR. SMITH: Dr. Cross, your Honor.

THE COURT: I might say to the jury, that when I permit a lawyer to ask a witness about prior testimony in a deposition, it's for one of two reasons.

One, the lawyer wants to help the witness recollect something that happened in the past; or the lawyer wants to impeach the witness by showing that the witness said or did something at an earlier time that is inconsistent with the present testimony.

I'm not sure what just happened, whether that was recollection or impeachment, but it has to be one of two things.

You may come forward, please.

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BRUCE CROSS

called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Will you state your name, please, sir?

A Bruce Cross.

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Q And your occupation, please?

A I'm a doctor, a radiation oncologist.

Q And your address please, doctor, your work address please, Dr. Cross?

A Akron General Medical Center, 400 Wabash Avenue, Akron, Ohio 44307.

Q Would you please tell us what a radiation oncologist is, please?

A It is a special type radiation that mostly deals with

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the treatment of cancer, mostly with X-ray beams or implantable radioactive materials to try to fight the cancer.
Q And in what ways does it fight the cancer in lay terms?
A Basically radiation therapy is rather like chemotherapy that you can aim and injure fast growing cells and selected circumstances where we can be careful about what cells we radiate and what normal cells we don't radiate by repeating the number of small injuries to the tumor. Over a period of time, we may be able to shrink tumors and control them.
Q You went to medical school at where, please?
A University of Missouri at Columbia.
Q And you graduated from medical school when, sir?
A 1983.

Q And where did you do your internship and residency, please?
A I started my internship at St. John's Mercy Medical Center in St. Louis; completed my residency at the Cleveland Clinic in Cleveland, Ohio; and was basically done with residency August of 1987.
Q Did you have occasion to teach?
A I took a teaching position after that at Washington University in St. Louis, Missouri and was on faculty there until 1988 when I moved up here.
Q And you are Board Certified in what field, please?
A Board Certified in radiation oncology; passed my boards in June of '87.
Q Licensed to practice medicine in the State of Ohio?
A Yes.
Q And when did you meet David Tompkin, approximately?
A I met him first part of July, 1992.
Q And the purpose of that meeting?
A He was referred to me for possible radiation therapy for his lung cancer.
Q And what did you then do, sir?
A After meeting with Mr. Tompkin, examining him and reviewing his x-rays, I talked with Dr. Haas, the medical oncologist, and we came up with a treatment plan to treat him with both radiation and chemotherapy.

Q Did you have occasion to examine CT scans?
A Yes, sir, I did.
MR. SMITH: With the court's permission, I'd like to put one on the screen.
THE COURT: Certainly.
MR. SMITH: This would be Plaintiff's Exhibit 9001.
May I approach the witness, your Honor.
THE COURT: Yes.
BY MR. SMITH:
Q Will that work?
A Yeah, did you want me to --
Q If you would?
MR. SMITH: May the witness step to the --
THE COURT: Certainly.
A This unfortunately is projecting in two colors, black and white. Actually on the CAT scan it's in shades of gray. But this represents the CAT scan of Mr. Tompkin at that time. The lungs basically are these black areas here, the backbone is right here, and the tumor is hugging the

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backbone right here. It's in the -- towards the middle of the right lung and along the backbone.
Q You showed them where it is.
MR. SMITH: Your Honor, may he attempt to show the jury the grays?

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THE COURT: Certainly.
MR. SMITH: You think the lights would help?
A Actually, this is pretty good because it is back lit. This is the CAT scan, this is the backbone here, this light gray mass here represents the tumor, this is the right lung, the shoulder blades, left lung.
This is the backbone here, the lungs are in black here, this light gray area is the tumor, which is along the backbone, the middle aspect right lung. Approximately right here.
Well, again, this is the -- these black areas here are the lung, this is the backbone, and this is the tumor in light gray here at the middle portion of the right lung and along the backbone.
Q Thank you, sir.
Oh, one other thing. Would you please tell us what Exhibit 9000 is?
A This is a treatment film which we use to do the planning for how we aim the radiation therapy, well in this case in Mr. Tompkin's case. Let's see if this will project any better. Maybe I'll just, bring it over here too.
Q It was on Dr. Cross.
A This was basically the chest, this is the backbone, the orange is the tumor, as I've outlined there from the CAT scans. The black markings there represent shields that we

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put into the machine to shape the radiation beam to his anatomy, treating not only the tumor but also the lymph node areas near it where it could spread.
Q Thank you, sir.
Approximately -- well first off, was there more than one set of radiation given with respect to Mr. Tompkin?
A Yes. Initially when Mr. Tompkin was referred to me the surgeon who had evaluated him felt him to be unresectable. And because patients with lung cancer do better if we can resect the tumor, I sought another opinion.
During his initial course of radiation therapy Mr. Tompkin was evaluated by another thoracic surgeon and we gave him essentially five weeks of radiation therapy as a preoperative regimen with the plan to do a resection, and if he had any viable any living tumor left at that point, then we would come back with a second course of radiation therapy to follow.
Things went well. He got radiation and chemotherapy. He underwent resection. He was found to have living tumor cells at the time of that resection and so he received a second course of radiation therapy to follow the first.
Q Approximately how many sessions were in each of the -- how many radiations were in each sessions?

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A He received 25 treatments initially, followed by surgery. And then the second course of radiation therapy following surgery was a total of 9 treatments.
MR. SMITH: Thank you very much.

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CROSS EXAMINATION

BY MR. McLAUGHLIN:

Q Good afternoon, doctor?

A Hello.

Q My name is Patrick McLaughlin. And we have not met before today, have we, sir?

A No, sir.

Q I take it, doctor, that the Exhibits that you've shown to the jury here today, the CT scan, for example, deals with the diagnosis and treatment of David Tompkin?

A Yes.

Q Okay. And I assume that at the time that Mr. Tompkin was referred to you, the diagnosis of adenocarcinoma of the lung had been made?

A That's correct.

Q You first saw him on July 2nd of 1992?

A Yes.

Q And you issued a written report on that day, sir?

A I did.

Q And the habits, did you indicate he used to smoke

cigarettes but quit 28 years ago?

A Yes, sir.

Q And under occupational history did you state he has worked as a bricklayer and has also worked around rubber compounds?

A Yes, sir.

Q Very good. Thank you, sir, I have nothing else?

MR. SMITH: No further questions.

MR. SUFFERN: I'm sorry.

MR. McLAUGHLIN: Mr. Suffern.

MR. SUFFERN: I'm sorry, and I understand Mr. Smith. We are not trying to team up on you, I represent another defendant. My name is Mike Suffern I have just a couple questions for you.

- - -

CROSS EXAMINATION

BY MR. SUFFERN:

Q The reason you engaged in radiation therapy is you want to kill the tumor cells, is that correct?

A That's correct.

Q Hypothetically, if this tumor material, if somebody's tumor material that had been subjected to radiation was then sent out for some sophisticated molecular testing, the testing would have to take into account the fact that the tissue that was being tested had been irradiated, isn't that

fair? DIRECT - ADELSBERG

A Yes, if it was resected after we radiated it, that's true.

Q Because the radiation can cause all kinds of damage to the cells and the chromosomes, is that right?

A That's true.

Q Thank you.

THE COURT: Anything further?

MR. SMITH: No.

Thank you, doctor.

THE COURT: You may step down. Thank you.

Please call your next witness.

MR. NACE: The plaintiff calls Donna Adelsberg, your Honor.

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DONNA ADELSBERG

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called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NACE:

Q Will you state your name, please?
A Donna Adelsberg.
Q And where do you live?

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A [DELETED]
Q You'll have to maybe speak up a little bit or pull that mike closer?
A Come closer.
Q Could you tell the jury what your relationship was to David Tompkin?
A I'm his daughter.
Q And how old are you?
A 35.
Q And did you have any brothers or sisters?
A Yes, two sisters.
Q And what were their names?
A Debra Eckart and Denise Preece.
Q And what is your -- where are you at in the age range compared to them?
A I'm the youngest sister.
Q You are the baby?
A Yes.
Q What -- what types of things did you and the family like to do when you were younger and living at home?
A We would, like after dinner time we would play games, have card games. We did a lot of, you know, outdoors. We would go outside. We had a cottage. We would do a lot at the cottage. We played different games down there, fished, went swimming, had some bonfires.

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Q What did you do at the bonfires?
A Usually had hot dogs marshmallows, sat around and talked.
Q S'mores?
A S'mores, yes.
Q Did you take any vacations together?
A Yes, we had quite a few. I recall a couple trips to Florida, went to Disneyland a couple times, and we also went to like Busch Gardens, Weeki Wachi in Florida. There have been numerous other ones. We went to Bahamas.
Q What's Weeki Wachi?
A It's kind of a Sea World type. They had mermaids and sea life; you could watch different shows.
Q And you talked about the cottage. This, where is the cottage at?
A Leesville Lake, it's down by Carrollton, Ohio.
Q And how often would you head down there?
A Every weekend we would go down usually, sometimes in the summer time we would go down maybe a week, stay a week, I know my mom and us kids would go down a little longer because sometimes my dad would be working.
Q Your dad was a hard worker?
A Yes, he was.
Q What types of things did you and your dad enjoy doing together?

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A We liked to go to flea markets. We were both bargain

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hunters, he would do all the bickering though, so, you know, shopping, went swimming a couple times, we would go swimming. Out to dinner a lot.
Q And what, what types of things did your dad like to do? What were his favorite things?
A Well, he besides working he liked to do a lot of woodworking. He had a little shop in the basement, he built a lot of different things. A lot of little different wood boxes and music boxes.
Q I wanted to show you something here and ask you if you could tell us what this is?
A That is a box that my dad made for me. I do a lot of crafts, sewing and cross stitch, quilting. He made that for a sewing chest for me so I could keep my supplies in. And it comes in very handy, keep myself organized somewhat.
Q And this is one he made in the basement?
A Yes, he made that, um-hum.
Q And do you know when, about when he would have made that?
A Probably early '90's, I would recall.
MR. NACE: Your Honor, may we show some more pictures.
THE COURT: Certainly.
MR. SMITH: This is exhibit 7296.

BY MR. NACE: DIRECT - ADELSBERG
Q Could you tell us what Exhibit 7296 is, please?
A That was a trip to Niagara Falls in Canada. We went there, I think we had two trips there. This was one in the '70's, early '70's we went there. That was with the falls in the background. We went there, we went shopping, did some of the little wax museums and stuff like that. We would go on the boulevard, went on some rides.
Q And one of these young ladies is you?
A Yes, I'm on the left hand side and my sister Denise is on the right hand side with my father in the middle.
MR. NACE: Thank you. Go to the next one.
MR. SMITH: 7298.
BY MR. NACE:
Q And could you tell us what Exhibit 7298 represents?
A That was a trip to Florida. That was Weeki Wachi. That's with the mermaid there. My mom is the to the right of the mermaid and my dad, and that's my sister Denise sitting down. I took the picture that's why I'm not in that one but that's our trip to Florida.
MR. NACE: Next one, please.
MR. SMITH: 7286.
BY MR. NACE:
Q And could you tell us what Exhibit 7286 represents?
A That was my dad, his birthday, and we got him a new

drill press because he loved to do woodworking. So we all went together and got him a brand new drill press for his birthday.
Q Looks like he was happy with that?
A Yes, very happy.
MR. NACE: Next one, please.
MR. SMITH: 7287.
BY MR. NACE:
Q Would you tell us what Exhibit 7287 depicts?
A That is my whole family with my sisters and their husband and my two nieces. And that's the day after my wedding, my husband and my wedding. And we all got together

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for us to open our presents at my mom and dad's house. And that's in the back of their house in Cuyahoga Falls.
Q I notice a lot of brick there also?
A Yes, that's the -- we had an addition put on. My dad did the addition, and that's the fireplace that he put on.
Q Thank you.
MR. NACE: Next one, please.
MR. SMITH: 7288.
BY MR. NACE:
Q And could you tell us what 7288 depicts?
A That is the picture of my wedding with my dad and my two sisters, September 18th, 1993. It was a very happy day, because I married my husband, and my dad was there to walk

me down the aisle. RECT - ADELSBERG
Q Thank you. Thank you.
MR. NACE: Could we see the next one, please?
MR. SMITH: 7295.
A That's a picture of Christmas time in 1995. When my dad was really sick. And it was the last time we all got together as a family.
Q And you mentioned that your father had gotten sick. Could you tell us how that affected the family?
A It was very hard because he could no longer do a lot of things for himself. My mom basically took care of him. My sister and I, we came over, would help him, you know, get in and out of bed and stuff like that. He couldn't drive any longer so my mom would have to drive him anywhere. He could no longer work. Or do his hobbies that he loved to do.
MR. NACE: Thank you, I have no further questions.
MS. CHAPMAN: No questions, your Honor.
THE COURT: Very well.
Thank you. You may step down.
THE WITNESS: Thank you.
MR. SMITH: May we approach the bench, your Honor?
THE COURT: You said you wanted to approach?

MR. SMITH: Yes, unless -- unless we were going to take a break.
THE COURT: We'll take a about a five minute break. You may file out.
(Brief recess.)
THE COURT: Please be seated.
I have inquired of the jury with respect to whether they could make a human, superhuman effort to be here by 8:30 on Monday morning, and they have agreed to do that. I told them that before I told them they were going home. And so I didn't bribe them. But anyhow, they have assured me they will make each effort to be here at 8:30. So you can plan on 8:30, Monday morning.
We'll now be in recess until 8:30, Monday morning. It is important that you recall the admonitions of the court. Do not discuss this case among yourselves. Do not discuss it with anybody else. Enjoy the weekend. Don't worry about this case, it will be here when you get back.
The jurors did have one very valid request, and that is they want, whenever a witness is introduced they want the name spelled out slowly.

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They are keeping notes and they are frustrated at times that they don't have the exact name of the

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witness.

And so what I'm going to do, I'll produce a list of every witness who has testified so far. Give that to them on Monday so they can use that for their own notes. But please keep in mind that they really want to have a name to go with the witness.

I did not request, as possibly I should have, that each witness be photographed so they have that when they start deliberation. But that's a thought that didn't come to me quick enough.

So we are not going to have the benefit of the photographs, but I know you are working very hard to keep track of each of the witnesses and what they are saying. And then there will come a time when there will be final argument when the lawyers will have an opportunity again, in addition to this interim argument, to remind you of what the individual witness has said and why you should rely upon them or not rely upon them as the case may be.

In any event, I want to thank all the jurors for the effort you made to be here today. Especially juror number 4 I knew went out of her way to come in here when she was wanted. The last thing she wanted to do was come up here when she was feeling so badly, and she's hung in there and everybody appreciates that

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fact, and me in particular.

So all of you enjoy the weekend and we'll see you Monday morning at 8:30.

Very well, you may file out.

I'll come back at 4:00. I expect you'll have the deposition or are you ready to talk about the depositions now.

MR. SMITH: No, not yet your Honor. Thank you.

THE COURT: I'll come back at 4:00.

MR. SMITH: Thank you, your Honor.

(Brief recess.)

THE COURT: Let the record show that the jury has been excused for the day and is not in the courtroom. The lawyers are present.

We had a brief side bar conference regarding additional testimony, and it was indicated to the court that plaintiff's counsel has a number of depositions that it would like to read as a part of its case in chief. And I gather that they were depositions that were not taken in this case, or alternatively might have been trial testimony. I'm not quite sure exactly what it all is.

And I asked counsel to meet with each other and see to what extent we had problems.

What I'm reluctant to do, is frankly continue

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this with the court reporter. I would rather have just a general conference about it and then to the extent that I have to make rulings, I could make the rulings either written in some fashion or bring the report back and do it.

But the reporter, they have had a hard week and I would just as soon excuse them for this purpose, if there is no objection to that.

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MR. COFER: No objection.

THE COURT: Let's just have a generalized discussion.

(Court adjourned.)

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C E R T I F I C A T E

We, Susan Trischan and Richard G. DelMonico, Official Court Reporters, in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

_____
Susan Trischan
Official Court Reporter

_____
Richard G. DelMonico
Official Court Reporter

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